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No. 20

In the Supreme Court
of the United States.
October Term, 1928.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

MOTION AND PETITION.

WILLIAM A. SMITH,
Attorney-general of Kansas,
JOHN G. EGAN,
Asst. Attorney-general of Kansas,
JOHN F. RHODES,
Attorneys for Petitioners.

12-7553

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No. ——

MOTION.

Now come the petitioners, Charles F. Hobbs, commissioner of insurance of the state of Kansas, and William A. Smith, attorney-general of the state of Kansas, by their attorneys, and move the court for leave to file the petition for writ of mandamus hereto annexed; and they further move that a rule be entered and issued to the Honorable John C. Pollock, district judge of the district court of the United States for the district of Kansas, directing him to show cause why a writ of mandamus should not be isued against him in accordance with the prayer of the petition, and why said petitioners should not have such other and further relief in the premises as may be just and meet.

WILLIAM A. SMITH,
JOHN G. EGAN,
JOHN F. RHODES,
Attorneys for Petitioners.

In the Supreme Court
of the United States
October Term, 1928.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the state of Kansas, Petitioners, for a Writ of Mandamus to Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

No. ——

PETITION.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the petitioners above named and respectfully allege:

I.

The petitioner, Charles F. Hobbs, is a citizen of the state of Kansas and the duly elected, qualified and acting commissioner of insurance of the state of Kansas, and under the laws of the state has jurisdiction over the administration and enforcement of the laws of said state with reference to insurance. The petitioner, William A. Smith, is a citizen of the state of Kansas and the duly elected, qualified and acting attorney-general of the state of Kansas, and under the constitution of the laws of the state has duties pertaining to the enforcement of the laws of the state in relation to insurance.

Honorable John C. Pollock, hereinafter referred to, is the duly appointed, qualified and acting district judge of the district court of the United States for the district of Kansas.

II.

At the same time that the bill of complaint in the case hereinafter mentioned of the Agricultural Insurance Company, a corporation, as plaintiff, was filed there were also filed in the United States district court for the district of Kansas, first division, 149 other bills of complaint in equity by 149 other stock fire insurance companies, respectively, against the same defendants and making the same allegations and prayers as the bill in that case, with the exception of differences in the number of years the respective plaintiffs were alleged to have been doing business in the state of Kansas and some differences in the state or country of their incorporation and in the amounts of impounded moneys they had deposited with the superintendent of insurance of the state of Kansas, and the amounts of the bonds they had filed, conditioned upon making certain refunds of premium rates, in a review proceeding or suit in the state court, and the amounts of their respective earned premiums, incurred losses and expenses and loss during the years 1912 to 1921, inclusive.

The allegations herein refer to each of said 150 suits. A list of the names of the plaintiffs and the numbers of the cases in the suit hereinafter referred to by the Agricultural Insurance Company, a corporation, as plaintiff, and in said 149 other suits, is attached hereto, marked Appendix A, and made a part hereof by reference.

III.

On the 29th day of March, 1928, the Agricultural Insurance Company, a corporation, filed a bill of complaint, in equity, as plaintiff, in the district court of the United States for the district of Kansas, first division, against William R. Baker, commissioner of insurance of the state of Kansas, and William A. Smith, attorney-general of the state of Kansas, as defendants, and in said bill of complaint the said Agricultural Insurance Company alleges that it is a stock fire insurance company, and has been engaged in the

business of insurance in the state of Kansas, and a license had been issued to it from year to year by the state of Kansas for more than fifteen years last past, and that the suit is of a civil nature in equity; that the matter in controversy is of the value of $5,000 and exceeds, exclusive of interest and costs, the sum or value of $3,000; that each defendant is a citizen of the state of Kansas, and that the plaintiff is a citizen of the state of New York; that on January 20, 1922, an order was made by Frank L. Travis, the then superintendent of insurance of the state of Kansas, requiring the Agricultural Insurance Company and other stock fire insurance companies doing business in the state of Kansas to make certain reductions and increases of rates charged and collected by each of them, respectively, for the issuance of policies of fire insurance upon property in the state of Kansas. In said bill the said insurance company alleges that said order of the superintendent of insurance of the state of Kansas is void as in violation of provisions in the fourteenth amendment to the constitution of the United States which declare, "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and that the statutes of the state of Kansas; that is, chapter 152, Session Laws of Kansas 1909 (which is entitled, "An act relating to fire insurance, and to provide for the regulation and control of rates of premium thereon, and prevent discrimination therein"), and which statute was carried into sections 40-461 to 40-471, inclusive, Revised statutes of Kansas, 1923, and into sections 40-911 to 40-921, inclusive, of chapter 231, Session Laws of Kansas, 1927, and chapter 207, Session Laws of Kansas, 1917 (entitled, "An act supplementary to article 9, chapter 53, of the General Statutes of 1915, authorizing the superintendent of insurance to investigate fire insurance rates and rating bureaus, and make an appropriation therefor"), which was carried into sec-

tions 40-472 and 40-473, Revised Statutes of Kansas, 1923, and into section 40-922 of chapter 231 aforesaid, as construed and applied by the district court of Shawnee county, Kansas, and the supreme court of the state of Kansas, in a so-called review proceeding had therein, brought by the plaintiff insurance company, and many other insurance companies, to contest the validity of said order of the superintendent of insurance, were in violation of said provisions of the fourteenth amendment to the constitution of the United States hereinbefore referred to.

In said bill of complaint it is alleged, in substance, that the enforcement of said statute, as construed and applied as aforesaid, and of said rate order would be in violation of the rights of the plaintiff under said provisions of the fourteenth amendment to the constitution of the United States, and, among other things, that said rates prescribed by said rate order upon fire insurance upon property in the state of Kansas, are noncompensatory to the plaintiff and therefore in violation of said provisions of said fourteenth amendment; that if said rate order should be enforced the plaintiff would sustain irreparable injury and damage and would be compelled either to issue policies on fire insurance and conduct its business in Kansas at a financial loss and suffer disorganization and destruction of its established business, or to cease doing business in the state of Kansas entirely, and thereby lose its agency contracts, agency plants, established business, maps, surveys, rating records and good will, which it alleges to be of great pecuniary value, and that if said rate order should be enforced and applied to the plaintiff, and the plaintiff should refuse to comply therewith, the defendant, the commissioner of insurance, among other things, would proceed to revoke the licenses of plaintiff and its agents to do business in the state of Kansas, and that the actual loss to the plaintiff, if said rate order should be enforced against it would occur from day to day

and amount to a large sum of money each day, if plaintiff would be required to write its insurance at the rates in such order prescribed.

In said bill the plaintiff alleges that if the said rate order should be enforced and applied to the plaintiff and the plaintiff should refuse to comply therewith, the defendant, the commissioner of insurance, would proceed to revoke the licenses of plaintiff and its agents to do business in the state of Kansas and the defendants would institute and prosecute criminal actions against the plaintiff and its many agents in Kansas, and plaintiff and said agents would be subjected to numerous prosecutions to recover money in thousands of dollars in fines and penalties, and that the defendants had threatened to, and unless restrained and enjoined by the court would take unlawful and unconstitutional action against and would interfere with the business of the plaintiff in the following particulars: That the rates of fire insurance which the plaintiff had been collecting prior to the making of said rate order were unlawful and that the public need not pay or contract to pay the same to the plaintiff and that thereby many persons would be induced to refuse to take insurance with the plaintiff and to pay premium charges to the plaintiff which it would demand upon insurance of properties in the state of Kansas, and unless the defendants should be enjoined they would bring or cause to be brought proceedings to enjoin or interfere with the collection by the plaintiff of the premium charges which it demanded and would cause actions and proceedings to be brought against it and its officers, directors, employees and agents, in which proceedings enormous and excessive fines and penalties prescribed by the laws of Kansas for violation of the insurance laws of said state would be imposed, and would bring or cause to be brought actions to impose fines or penalties against the representatives of the plaintiff, and would bring or institute pro-

ceedings to recover and cancel licenses of the plaintiff and its many agents in Kansas, and unless restrained would refuse renewal of the license of the plaintiff and the licenses of its agents in Kansas upon the ground of failure to conform to such rate order, and that divers persons would commence actions through and in the name of the defendants and would subject the plaintiff to great and irreparable loss and damage, and would subject the plaintiff, its officers, employees and agents to a multiplicity of suits, and divers proceedings would be brought by policyholders and others against the impounded funds of the plaintiff and upon the bond given by it, and they would bring such actions in the name of the defendants, and that if defendants should receive advance notice of plaintiff's application for a restraining order the defendants would proceed in divers ways to enforce the said rate order against the plaintiff and would institute a multiplicity of suits against the plaintiff, and would proceed to revoke the licenses of plaintiff, its agents and representatives to do business in Kansas, and would cause or permit proceedings to be instituted in the name or names upon the bond referred to against plaintiff and its surety on said bond.

The bill alleges that all of the stock fire insurance companies then doing business in Kansas, more than 130 in number, including said plaintiff, had filed a joint review proceeding to review said rate order in the district court of Shawnee county, Kansas. It alleges that said case was considered on appeal by the supreme court of Kansas, which sustained said rate order as against said joint review proceeding and justified said order, and that in said cause unconstitutional invasion of rights of the plaintiff set forth in the bill were not nor could have been considered.

It is alleged in said bill that to avoid a confiscation of the property of the plaintiff and to avoid compliance with the said rate order, and as a condition unlawfully imposed by the state of Kansas and

orders of the district court of Shawnee county, Kansas, in which said review proceedings were begun, the plaintiff deposited with the defendant, the commissioner of insurance, large sums of money representative of the difference between the rates of premium upon fire insurance theretofore exacted and those directed and ordered by the rate order to be thereafter exacted at lower rates, and the amount of money so deposited was large and was still retained by the defendant commissioner of insurance, and under his direction and control, and that the plaintiff was further unlawfully required and compelled by the order of the said state court and the demand of the defendant commissioner of insurance to execute a bond payable to the defendant commissioner of insurance for the indemnity of policyholders conditioned upon the repayment by the plaintiff of excess rates collected by it upon fire and incidental insurance in the state of Kansas in excess of the rates ordered by the superintendent of insurance by its order of January 20, 1922, in the period September 1, 1925, to October 31, 1927, inclusive, and that the defendant had executed and filed such bond.

It is prayed in said bill that the court decree that the proposed action of the defendants, and each of them, for the revocation of the licenses of the plaintiff and its agents, is in violation of the rights of plaintiff under section 1 of the fourteenth amendment of the constitution of the United States.

It is prayed in said bill, among other things, that the court issue a restraining order to be effective on the hearing of plaintiff's application for an interlocutory injunction, and that upon such hearing an interlocutory injunction issue, and that by said restraining order and by said interlocutory injunction the defendants, and each of them, their deputies, attorneys, solicitors, servants and representatives, and all others acting, or claiming or assuming to act, for or under the authority of the name of said defendants, or either of

them, and all other persons who then or thereafter should seek or attempt to enforce said rate order, be restrained and enjoined from taking any proceedings whatever, under or pursuant to, or for the enforcement of obligations arising under, the said rate order, and from enforcing or attempting to enforce, or from advising, instituting, prosecuting or aiding in any action, suit or proceeding, or otherwise, to enforce said rate order, and from taking any steps or proceedings or advising, instituting, prosecuting or aiding in any action, suit, or proceeding under the laws of Kansas pursuant to said statute aforesaid, and that the defendants be restrained and enjoined from revoking the license of the plaintiff or any of its agents or representatives, and from refusing to renew licenses of plaintiff of any of its agents or representatives, or withholding the same, upon the ground of any such supposed violation by them, or any of them, of the said statute or rate order, and that the defendant, the commissioner of insurance of the state of Kansas, be restrained and enjoined from distributing, paying, transferring, relinquishing, delivering or otherwise permitting himself to become divested of the impounded moneys with him deposited by the plaintiff, or any interest, increment or increase thereof, in anywise, in his possession or control, except as he might deliver or pay or surrender the same to the plaintiff, and that upon the final hearing of the cause the said impounded moneys be declared and held to be the moneys of the plaintiff, together with all increase, interest and increment thereon arising, and that the defendant, the commissioner of insurance, be directed and ordered to deliver and pay the same to the plaintiff.

Said bill also prays that the interlocutory injunction above referred to issue upon defendants upon five days' notice to them and to the governor of Kansas, respectively, of the intended application therefor to enjoin and restrain the defendants as above prayed,

pending the hearing of the cause or until the further order of the court, "and that such hearing be had before three judges as is by statute prescribed in such cases; that a temporary restraining order may be issued as above prayed without notice, to be effective until the date to be set by the court and until hearing and determination of application for interlocutory injunction; that upon final hearing in this cause, which the plaintiff prays may also be had before three judges as provided by law, that said interlocutory injunction shall be made permanent."

Said bill of complaint also prays that the defendants be restrained and enjoined from enforcing or attempting to enforce a bond of the plaintiff executed pursuant to said rate order with surety.

IV.

On April 11, 1928, the plaintiff filed in said cause a motion to the court "to constitute and assemble a court of three judges as by law provided and that, as promptly as may be, such court may consider this application of the plaintiff for an interlocutory injunction and may grant a hearing; and upon such hearing grant to the plaintiff an interlocutory injunction as prayed for in the bill of complaint filed herein."

A copy of said motion, marked "Appendix C," is attached hereto and made a part hereof by reference.

Upon the motion of the plaintiff, and upon March 29, 1928, the Honorable John C. Pollock, said judge of said district court, issued a ruling to show cause to said William R. Baker, then commissioner of insurance of the state of Kansas, and said William A. Smith, attorney-general of the state of Kansas, at the chambers of said court at Kansas City, Kansas, on April 3, 1928, why a restraining order should not be issued against the defendants in said cause, as applied for by the plaintiff.

April 3, 1928, the plaintiffs, by their solicitors, and the de-

fendants, by their solicitors, appeared before the Honorable John C. Pollock, judge of said court, at his chambers at Kansas City, Kansas, and the motion of plaintiff for a restraining order, as aforesaid, was presented to said judge. The defendants, by their solicitors, then and there stated to the court that they requested it to assemble a court of three judges to hear the application of the plaintiff for an interlocutory injunction. The said judge, in reply, stated, in substance, that: You will have a difficult time in getting a three-judge court out of me.

The said judge suggested that it should not be necessary to issue a restraining order against the defendants, and that if they would agree not to take, or permit any action to be taken which would be the subject of restraint by a restraining order, without first giving notice to the plaintiff or its counsel, of intention so to do in ample time, so that the plaintiff might resort to the court for an appropriate order, that the court would not issue a restraining order. The solicitors for the defendants stated that they would so promise. Accordingly the court entered an order, at said time and place, in the following terms, omitting here the title of the case:

ORDER.

This cause coming on to be heard upon the motion of the plaintiff for a temporary restraining order according to the prayer of the bill of complaint and the rule of this court heretofore entered upon the defendants to show cause on this date why such order should not be entered, comes now the plaintiff by Robert J. Folonie and Robert Stone, its solicitors, and the defendants by William A. Smith, attorney-general, and John F. Rhodes, their solicitors, and also appear the defendants in person, and thereupon the defendants in open court state to the court that they will take no action and permit no action which would be the subject of restrain by a temporary restraining order, without first giving notice to the plaintiff or its counsel of intentions so to do in ample time so that plaintiff may resort to this court for an appropriate order:

And the court finding that the defendants are honorable persons whose assurances may be taken in such matters, the court does now accept their said assurance, and upon such consideration does refrain from entry of any temporary restraining order, with leave to the plaintiff to renew said application at any time if the plaintiff be so advised.

Dated at Kansas City, Kansas, April 3, 1928.

(Signed) JOHN C. POLLOCK,
United States District Judge.

The clerk is hereby directed to enter an order identical with the foregoing in each case pending in this court, numbers 963-N to 1111-N, both inclusive.

(Signed) JOHN C. POLLOCK, *Judge.*

There were pending at the same time in said United States district court for the district of Kansas, first division, 149 other suits in equity by stock fire insurance companies as plaintiffs, respectively, against the same defendants; that is, the commissioner of insurance of the state of Kansas and the attorney-general of the state of Kansas, in which the bills of complaint were the same as that in the suit by said The Agricultural Insurance Company, a corporation, with minor variations to fit the particular plaintiff, and in all of said suits the same proceedings were had prior to and upon April 3, 1928, and the same order was made by said court upon said last-named date as above recited in the case by said The Agricultural Insurance Company as plaintiff. Another reference is hereafter made to said other cases, by which the allegations of this petition are made applicable thereto. A list of this and said 149 other cases, which list shows the numbers of the cases and the names of the plaintiffs, marked "Exhibit A," is attached hereto and made a part hereof by reference.

VI.

At the beginning of said suit there was pending in the United States court for the western district of Missouri a suit by the said Agricultural Insurance Company, and suits by many other stock

fire insurance companies herein referred to as parties plaintiff in similar cases in the United States district court for the district of Kansas, first division, which suits in said United States district court in Missouri were against the superintendent of the insurance department of the state of Missouri, as defendant, to enjoin the enforcement of a rate order by such state officer requiring reductions in rates of fire insurance by stock fire insurance companies doing business in Missouri, including the said Agricultural Insurance Company, and including many other of the plaintiffs in said suits in the United States district court in Kansas, on the alleged ground that said rate order was in violation of the rights of the plaintiffs under provisions of the fourteenth amendment to the constitution of the United States, and that the statute of the state of Missouri under which said Missouri rate order had been made was in violation of the rights of said plaintiff under said fourteenth amendment. In said cases in the United States district court in Missouri an order was made by the court or a judge thereof calling to the assistance of the judge of said court two other judges to hear and determine an application which had been made by the plaintiffs in said suits for an interlocutory injunction to enjoin the enforcement of said Missouri rate order and statute, which said two other judges were called upon under section 266 of the amendment of the judicial code, United States Code, title 28, section 380. A court of three judges was, pursuant to said call, assembled, and the motion of plaintiffs in said cases in the United States district court in Missouri for an interlocutory injunction against the enforcement of said Missouri rate order and Missouri statute was argued April 21 and 22, 1928, and submitted to said court of three judges upon the latter date, and said court took under advisement the questions presented by the motion for an interlocutory injunction.

Upon April 13, 1929, said court of three judges rendered a decision upon said motion and application for an interlocutory injunction.

The questions presented upon said application for an interlocutory injunction in said cases were similar, though with distinctions, to the questions presented in the above referred to cause and the 149 other suits above referred to by various insurance companies in the United States district court for the district of Kansas, first division.

It was understood between the parties to said 150 suits, in the last-named court, that it would be desirable, before proceeding to try the facts in said cases, to await the decision of said three-judge court in the Missouri cases.

VII.

Upon May 7, 1928, the defendants in the above-entitled cause filed a motion to dismiss the said suit on the ground, among other things, that the bill in equity filed by the plaintiff showed that the pretended cause of action alleged in the bill had been litigated by the plaintiff by suit in the state courts of Kansas and the supreme court of the state of Kansas had rendered a decision and judgment in said suit which upheld the rate order of the superintendent of insurance of the state of Kansas complained of in the bill of equity, and decided and adjudged against the plaintiff herein, and that said decision and judgment of the supreme court of the state of Kansas constituted *res adjudicata* of the pretended cause of action alleged in said bill in equity and constituted a bar to the maintenance or prosecution of the above-entitled suit.

Said motion to dismiss was on November 20, 1928, argued orally by the solicitors for the parties and briefs were filed by them and the questions presented by said motion were submitted to the court, and upon consideration of the same the said court, upon January 8, 1929, made an order denying said motion, to which order the de-

fendants excepted. Defendants were given time in which to file an answer.

In due time the defendants filed an answer in said cause.

VIII.

Thereafter upon March 18, 1929, the plaintiff filed its supplemental bill, alleging, in substance, that Charles F. Hobbs was the successor in office of William R. Baker, as commissioner of insurance of the state of Kansas, and was the duly qualified and acting commissioner of insurance of the state of Kansas and had adopted the acts and policies of William R. Baker as such commissioner in all things complained of in the bill of complaint, and renewed the allegations in the bill of complaint as against Charles F. Hobbs as commissioner of insurance of the state of Kansas, and prayed that said Charles F. Hobbs, as such commissioner, be substituted as a party defendant in lieu of William R. Baker, as such commissioner, and that he be subpœnaed to appear and be required to make full and direct answer to the bill. Upon March 18, 1929, the court made an order granting leave to file said supplemental bill and substituting Charles F. Hobbs as commissioner of insurance of the state of Kansas as defendant in place of William R. Baker as such commissioner. A copy of said supplemental bill is attached hereto, made a part hereof by reference, and marked "Appendix D."

IX.

Upon March 30, 1929, the defendant, Charles F. Hobbs, as such commissioner of insurance, filed a motion to dismiss the bill, which was similar to the motion to dismiss the suit which had been theretofore filed as above referred to, and upon April 6, 1929, said motion was submitted to the court by said Hobbs, and was overruled by the court, to which ruling said Hobbs excepted.

Upon the same date said Hobbs was granted leave and time in which to file an answer to said bill and supplemental bill, and said

defendant William A. Smith, attorney-general of the state of Kansas, was granted leave and time in which to file an amended answer to said bill and to said supplemental bill.

X.

Upon April 25, 1929, and within due time, the answer of Charles F. Hobbs and the amended answer of defendant, William A. Smith, to said bill and said supplemental bill, were filed in said cause.

Said answer last referred to admits certain allegations in the bill and supplemental bill and denies certain allegations, and makes allegations of new matter. Said answer, in substance, among other things, denies the allegations of the bill that the rights of plaintiff under the provisions of the fourteenth amendment to the constitution of the United States were violated by said rate order or by said Kansas statute as construed and applied by the district court of Shawnee county, Kansas, and the supreme court of the state of Kansas, and denies that the said rate order required the plaintiff to put into effect rates which were not compensatory or in violation of said provision of said fourteenth amendment. Said answer admits and alleges that a certain suit or review proceeding had been prosecuted in the district court of Shawnee county, Kansas, the supreme court of the state of Kansas, and the supreme court of the United States by the plaintiff therein, and many other insurance companies, to attack the validity of said rate order brought by the plaintiff and other fire insurance companies and, among other things, alleges that plaintiff presented and there was adjudicated in said suit contentions that said rate order violated the rights of plaintiff under the fourteenth amendment to the constitution of the United States and that plaintiff could in said case have presented for decision any question of alleged violation of the rights of plaintiff under said amendment by said rate order or the statutes of Kansas under which it was made, and alleges that by virtue of the judg-

ment of the supreme court of Kansas in said suit in that court, the issues therein had been adjudicated and decided by said court against the plaintiff and said other insurance companies, and that said judgment of the supreme court of Kansas was in full force and not reversed, and was *res adjudicata* and conclusive upon the plaintiff and a bar to the maintenance of the pretended cause of action set out in the bill in equity in the cause, and that by reason thereof the said district court of the United States for the district of Kansas, first division, has no authority, right or jurisdiction to render or enter any order, decree or judgment in said cause in favor of the plaintiff, but that the bill in equity in such suit should be dismissed at the costs of the plaintiff.

In said answer, among other things, the said defendants admit and allege that in said litigation in the state court the district court of Shawnee county had made an order requiring the impounding with the superintendent of insurance of the state of Kansas of the excess fire insurance rates charged and collected by the plaintiff and other stock insurance companies above the amount fixed by said rate order, and that the plaintiff and many other fire insurance companies had impounded such excesses with the superintendent of insurance. Said answer also admits and alleges that in said suit begun in the state district court, upon appeal to the supreme court of Kansas, the said supreme court had made an order requiring the appellee insurance companies, including the plaintiff, to file with the clerk surety bonds to equal the amount of such excess in rates, for the period September 1, 1925, to October 31, 1927. Petitioners state that the order of impounding referred to covered the premiums written during the period March 1, 1922, to August 31, 1925, inclusive.

XI.

Petitioners allege that on May 4, 1929, the plaintiff filed in said cause its motion for an order of reference and the appointment of a master in said case, and that on May 10, 1929, said motion of the plaintiff was presented by it to the Honorable John C. Pollock, judge of said United States district court at Fort Scott, Kansas, and upon said date the said judge made an order of reference in said cause appointing Hon. Charles G. Yankey, of Wichita, as special master with power, among other things, to hear the evidence and make and file with the clerk of the court findings of fact and conclusions of law concerning the issues in the case, and also to file with the clerk of the court all the evidence taken in the case.

XII.

On May 6, 1929, the defendants served upon the plaintiff and filed in the cause a notice which referred to said order of April 3, 1928, and stated that on and after May 20, 1929, the defendants would proceed to enforce the rate order made by former Superintendent of Insurance Travis on January 20, 1922, which, by its terms, was to have taken effect on March 1, 1922, and which rate order is referred to in the bill of complaint of the plaintiff.

XIII.

On May 7, 1929, the defendants in said case filed a motion therein which was entitled, "Motion by defendants for a hearing before three judges of the application of the plaintiff for an interlocutory injunction," and recited, "Come now Charles F. Hobbs, commissioner of insurance of the state of Kansas, and William A. Smith, attorney-general of the state of Kansas, defendants in the above-entitled case, and move the court and the judge that the judge call to his assistance two other judges to hear and determine the application of the plaintiff for an interlocutory injunction, as by

law provided, and particularly by section 266, as amended, of the judicial code, United States Code, title 28, section 380."

Notice was given by defendants to the plaintiff that said motion would be presented to the court at the same time and place as the motion of the plaintiff for an order of reference and appointment of a master.

XIV.

Upon May 10, 1929, at the same time and place as the presentation by the plaintiff of its motion for an order of reference and the appointment of a master, these defendants stated to Honorable John C. Pollock, judge of said court, referring to the order of April 3, 1928, that they had served notice upon the plaintiff that on and after May 20, 1929, the defendants would proceed to enforce the said rate order, and called up before said judge their said motion that the judge call to his assistance two other judges to hear and determine the application of the plaintiff for an interlocutory injunction. Thereupon the plaintiff stated that it withdrew its motion for the assembling of a court of three judges to hear its application for an interlocutory injunction. The defendants then called the judge's attention to the fact that the prayer in the bill of complaint requested the court to assemble a court of three judges to hear the application for an interlocutory injunction. The plaintiff then stated that it did not then present or press its prayer for such a court of three judges, and the said judge then stated that as the plaintiff did not move for a court of three judges to hear the application for an interlocutory injunction the said motion of the defendants for a court of three judges did not pertain to any matter before the court, and he further stated that he did not like to call a court of three judges, and that he thought this case could be disposed of before it would be necessary to call a court of three judges to hear an application for an interlocutory injunction, and that if the plain-

tiff would apply to him before May 20, 1929, for a restraining order against the defendants he would grant it.

XV.

On May 16, 1929, the plaintiff notified the defendants that at 10 a. m. May 18, 1929, it would apply to Hon. John C. Pollock, judge of said court, at his chambers at Kansas City, Kansas, for an interlocutory injunction. There was served upon the defendants with said notice a copy of the motion of the plaintiff for an interlocutory injunction. Said motion, among other things, referred to said order of April 3, 1928, and stated:

Plaintiff further says that the defendants have now served written notice upon the plaintiff that they withdraw their pledge to the court and will, if not restrained by order of the court, after May 20, 1929, proceed "to enforce the rate order made by former Superintendent of Insurance Travis, on January 20, 1922, which by its terms was to have taken effect on March 1, 1922, and which rate order is referred to in the bill of complaint of plaintiff in said case," meaning and intending thereby, as this plaintiff believes and therefore alleges, to cancel the license of this plaintiff to do business in the state of Kansas, and otherwise proceed and act against the plaintiff to its irreparable injury and damage.

Plaintiff moves that an interlocutory injunction may be granted to it to restrain the defendants and each of them, their attorneys, agents and employees from in any wise canceling the license of the plaintiff to do business in the state of Kansas, and that defendants be restrained from canceling the licenses of the agents of the plaintiff, because of any supposed violation of the said rate order aforesaid and the terms thereof, and that said interlocutory injunction remain in force until further order of the court.

On May 17, 1929, the plaintiff served upon defendants copies of two affidavits which the plaintiff represented it proposed to use in support of its motion for an interlocutory injunction. One of said affidavits was by J. D. Parker, who stated that he was an actuary and was familiar with the rates charged by fire insurance companies

in Kansas, and said affidavit treated of the making of fire insurance rates and the classification of such rates.

The other of said affidavits was by Charles R. Street, who stated that he was vice president of the Great American Insurance Company and vice president of the American Alliance Insurance Company and that said companies did a fire insurance business. Said affidavit treated the subject of profits in the conduct of fire insurance business.

XVI.

On the morning of May 18, 1929, and before the presentation of said motion to the Honorable John C. Pollock, judge of said court, the solicitors for plaintiff showed to the solicitors for defendants certain exhibits attached to the affidavit of J. D. Parker, which purported to be general schedules for the making of fire insurance rates in force in the state of Kansas on January 20, 1922, as set forth in the bill of complaint.

The originals of said two affidavits have been filed in the case by the plaintiff.

XVII.

On the forenoon of May 18, 1929, and at the chambers of Hon. John C. Pollock, judge of said court, at Kansas City, Kansas, the plaintiff presented to said judge its motion for an interlocutory injunction above referred to, and also a form of an order of interlocutory injunction against the defendants. Thereupon the defendants objected to the granting of an order of interlocutory injunction and requested the said judge to call to his assistance two other judges to hear and determine the motion of plaintiff for an interlocutory injunction, and at the same time and place the defendants presented their said motion that the judge should call to his assistance two other judges to hear and pass upon the motion for an interlocutory injunction.

The said judge overruled the request of the defendants that he should call to his assistance two other judges to hear and determine the motion for an interlocutory injunction, to which ruling the defendants then and there excepted, and said judge stated at the time that he would not then hear the motion of defendants for him to call to his assistance two other judges to hear and determine the motion of plaintiff for an interlocutory injunction, to which ruling the defendants then and there excepted.

Thereupon said judge made an order in said case of an interlocutory injunction against the defendants, Charles F. Hobbs, as commissioner of insurance of the state of Kansas, and William A. Smith, as attorney-general of the state of Kansas, their attorneys and agents, enjoining them from canceling the license of plaintiff to do business in the state of Kansas, because of supposed violation by the plaintiff of the said rate order, and also from canceling the licenses of plaintiff's agents on account thereof; provided that the plaintiff should file a bond in the penal sum of one thousand dollars with a surety conditioned to pay such costs and damages as might be incurred by any party who might be found to have been wrongfully enjoined or restrained by such order. To all of which the said defendants then and there excepted.

Such bond was approved and filed.

A copy of said order of May 18, 1929, marked "Appendix F," is attached hereto and made a part hereof by reference.

At the same time and place the said judge made an order refusing to pass upon the motion of the defendants that he should call to his assistance two other judges to hear and determine the application of the plaintiff for an interlocutory injunction, and stated that he did not consider the motion for an interlocutory injunction then presented by the plaintiff required three judges, and that he would

not pass upon said motion of defendants then. To which ruling the defendants then and there excepted.

A copy of said last-named order of May 18, 1929, marked "Appendix G," is attached hereto and made a part hereof by reference.

By said two orders, said judge denied the said motion of the defendants to constitute a court of three judges to hear and determine the motion of plaintiff for an interlocutory injunction.

The defendants state that the rulings, statements and orders of the court as hereinbefore recited, upon May 10, 1929, and upon May 18, 1929, and in that the court upon May 18, 1929, granted an interlocutory injunction as hereinbefore set forth against the defendants without calling to his assistance two other judges to hear and determine the application of the plaintiff for an interlocutory injunction, as required by section 266, as amended, of the judicial code, United States Code, title 28, section 380, were in violation of the rights of the defendants.

Defendants state that it is the purpose and intention of the said Hon. John C. Pollock, judge of said court, to allow said interlocutory injunction to remain in effect until final decree is entered in said case in said court and not to call to his assistance two other judges to hear and determine the motion of the plaintiff for an interlocutory injunction, or the prayer in the plaintiff's bill for an interlocutory injunction, and not to call to his assistance two other judges to take part with the judge of said district court in the final hearing of such suit in the district court and the question of what final decree should be entered, all in violation of the rights of the defendants as aforesaid.

XVIII.

Petitioners state that copies of the statutes under which said rate order was made by the superintendent of insurance of Kansas, which are referred to in the bill of complaint, that is, chapter 152,

Session Laws of Kansas, 1909, and section 1 of chapter 207, Session Laws of Kansas, 1917, are attached hereto, marked, respectively, "Appendix H" and "Appendix I," and are made a part hereof by reference.

Petitioners state that one of the means by which the commissioner of insurance can enforce such rate order, if not enjoined from doing so, is by revoking the license or certificate to do an insurance business in Kansas of any insurance company, for failure to comply with said rate order as to rates of premium for fire insurance upon policies of fire insurance written or issued by it upon property in Kansas, under authority of section 40-222, chapter 231, Session Laws of Kansas, 1927. A copy of said section of the statute, marked "Appendix J," is attached hereto and made a part hereof by reference.

Petitioners state that another means by which the commissioner of insurance can enforce such rate order, if not enjoined from doing so, is by revoking the license of any agent of a fire insurance company who shall write or issue policies of fire insurance upon property in Kansas, for failure to comply with said rate order as to rates of premium for fire insurance upon policies of fire insurance written or issued by him upon property in Kansas, under section 40-242, chapter 231, Session Laws of Kansas, 1927. A copy of said section of the statute, marked "Appendix K," is attached hereto and made a part hereof by reference.

A copy of section 266, of the judicial code, as amended, title 28, section 380, of the United States Code, is attached hereto, marked "Appendix L," and made a part hereof by reference.

XIX.

Defendants state that there are 149 other suits in the same court by various stock insurance or assurance companies which transact the business of fire insurance in the state of Kansas, which are identified upon Appendix A, and that the same pleadings, orders,

proceedings, actions, objections and exceptions took place in each of said other 149 cases as herein above set forth and at the same times and places as in the case by the Agricultural Insurance Company as plaintiff; but that the allegations of the answers of the defendants to the bill and the supplemental bill on the question of the plaintiffs being named as parties in said suit in the state court and of their aiding in prosecuting said suit and on the question of *res adjudicata* by virtue of the judgment of the supreme court of Kansas, are different in detail in sixteen of said suits from the allegations on such subject in the remainder of said suits. All of the allegations of this petition concerning the pleadings, proceedings, orders, rulings, objections and exceptions in the case by the Agricultural Insurance Company as plaintiff, and the effect thereof and the prayer therein, are hereby expressly made to apply to each of said 149 other suits the same as if herein in detail set forth with reference to each of said 149 other suits.

XX.

The petitioners allege that the total amount of excess of fire insurance premiums over the rates fixed in said rate order on policies of fire insurance upon property situate in the state of Kansas, collected by said 150 stock fire insurance companies from March 1, 1922, the date when said rate order was declared by the superintendent of insurance to become effective, until March 29, 1928, the date of the beginning of said 150 suits in the district court of the United States for the district of Kansas, first division, is over $4,600,000, and the total of the like excess from March 29, 1928, to May 15, 1929, is over $850,000; and that the total of the portion of said excess premiums for the period March 1, 1922, to August 31, inclusive, 1925, impounded by the insurance companies with the superintendent of insurance of the state of Kansas, now known as

the commissioner of insurance of the state of Kansas, under order of the district court of Shawnee county, Kansas, in the case herein referred to brought by the insurance companies in that court, is over $2,650,000, and that the total of the penalties in the bonds filed by the insurance companies with the clerk of the supreme court of Kansas under order of that court, covering excess premiums collected by those companies in the period September 1, 1925, to October 31, inclusive, 1927, is over $1,650,000, and that in said 150 suits in the district court of the United States for the district of Kansas the plaintiffs make allegations and prayers in their bills of complaint for the purpose of having said district court take jurisdiction and control of said impounded moneys and of said bonds.

XXI.

Defendants state that said Hon. John C. Pollock, judge of the said district court, was without jurisdiction to make said order of said interlocutory injunction and that said district court will be without jurisdiction to hear the issues and to make a final decree in said case without the hearing and determination thereof by three judges under the statute as aforesaid. These petitioners have no means of relief except by application for a writ of mandamus.

Wherefore, Your petitioners pray that a rule be made and issued from this court, directed to said Hon. John C. Pollock, district judge of the United States district court for the district of Kansas, to show cause why a writ of mandamus should not issue commanding the said judge to call to his assistance two other federal judges as provided by section 266, as amended, of the judicial code, being title 28, section 380, United States Code, to hear and determine the motion and the prayer of the plaintiff for an interlocutory injunction against the defendants in said cause of the Agricultural Insurance Company, a corporation, plaintiff, versus Charles F. Hobbs,

commissioner of insurance of the state of Kansas, and William A. Smith, attorney-general of the state of Kansas, and in said 149 other causes in said United States district court for the district of Kansas, herein before referred to and identified upon Appendix A attached hereto, and for them also to hear and determine the issues in each of said 150 suits at the final hearing thereof, and to render a decree in each of said 150 suits at the final hearing thereof.

And your petitioners further pray that a writ of mandamus be made and issued from this honorable court, directed to the said Hon. John C. Pollock, judge of the United States district court for the district of Kansas, to call to his assistance two other federal judges as provided by section 266, as amended, of the judicial code, being title 28, section 380, United States Code, to hear and determine the motion and the prayer of the plaintiff for an interlocutory injunction against the defendants in said cause of the Agricultural Insurance Company, a corporation, plaintiff, versus Charles F. Hobbs, commissioner of insurance of the state of Kansas, and William A. Smith, attorney-general of the state of Kansas, and in said 149 other causes in said United States district court for the district of Kansas, hereinbefore referred to and identified upon Appendix A attached hereto, and for them also to hear and determine the issues in each of said 150 suits at the final hearing thereof, and to render a decree in each of said 150 suits at the final hearing thereof.

And your petitioners further pray for such other and further relief in the premises as may be just and meet.

William A Smith
Attorney-general of the State of Kansas.

Charles F. Hobbs
Commissioner of Insurance of the State of Kansas.

By William A. Smith
John G. Egan
John F. Rhodes
Their Attorneys.

State of Kansas, County of Shawnee, ss.

William A. Smith and Charles F. Hobbs, being first duly sworn, on oath each depose and say that they are the petitioners hereinbefore referred to; that they have read the foregoing petition and know the contents thereof and that the matters and allegations in said petition set forth by them are true.

Charles F Hobbs.

Subscribed and sworn to before me, a notary public in and for Shawnee county, Kansas, this 25 day of May, 1929.

Thos. P. Blank
Notary Public in and for Shawnee County, Kansas.

My commission expires Feb 8- 1933

(Seal)

Washington, District of Columbia, United States of America, ss.

William A. Smith, being first duly sworn, on oath deposes and says that he is one of the petitioners hereinbefore referred to; that he has read the foregoing petition and knows the contents thereof, and that the matters and allegations in said petition set forth by him are true.

.....

Subscribed and sworn to before me, ...,
clerk of the supreme court of the United States, this ..... day
of ....., 1929.

.....

..... Clerk of the Supreme Court
of the United States.

APPENDIX A.

List of the Names of the Plaintiffs and the Numbers of Cases in 150 Cases by Stock Fire Insurance Companies, as Respective Plaintiffs, Against the Commissioner of Insurance and the Attorney-general of Kansas, Pending in the United States District Court for the District of Kansas, First Division.

Ætna Insurance Company	962-N
Agricultural Insurance Company	963-N
Alliance Insurance Company	964-N
Allemania Fire and Insurance Company	965-N
American Equitable Assurance Company of New York	966-N
American Alliance Insurance Company	967-N
American Central Insurance Company	968-N
American Insurance Company	969-N
American Eagle Fire Insurance Company	970-N
American National Fire Insurance Company	971-N
Atlas Assurance Company, Ltd.	972-N
Automobile Insurance Company	973-N
Bankers and Shippers Insurance Company	974-N
Baltimore American Insurance Company	975-N.
Boston Insurance Company	976-N
British America Assurance Company	977-N
Commerce Insurance Company	978-N
Chicago Fire and Marine Insurance Company	979-N
Carolina Insurance Company	980-N
Commonwealth Fire and Marine Insurance Company	981-N
Caledonian-American Insurance Company	982-N
Caledonian Insurance Company	983-N

California Insurance Company 984-N
Camden Fire Insurance Association 985-N
Central States Fire Insurance Company 986-N
Citizens Insurance Company 987-N
City of New York Insurance Company 988-N
Columbia Insurance Company 989-N
Columbian National Insurance Company 990-N
Commercial Union Assurance Company, Ltd. 991-N
Commercial Union Fire Insurance Company 992-N
Commonwealth Insurance Company 993-N
Concordia Fire Insurance Company 994-N
Connecticut Fire Insurance Company 995-N
Continental Insurance Company 996-N
County Fire Insurance Company of Philadelphia 997-N
Dubuque Fire and Marine Insurance Company 998-N
Delaware Insurance Company 999-N
Detroit Fire and Marine Insurance Company 1000-N
Eagle Star and British Dominions Insurance Company, Ltd. 1001-N
East and West Insurance Company 1002-N
Eagle Fire Company 1003-N
Employers Fire Insurance Company 1004-N
Equitable Fire and Marine Insurance Company 1005-N
Federal Insurance Company 1006-N
Fidelity Phenix Fire Insurance Company 1007-N
Fire Association of Philadelphia 1008-N
Federal Union Insurance Company 1009-N
Fidelity Union Fire Insurance Company 1010-N
First American Fire Insurance Company 1011-N
Franklin National Insurance Company of New York 1012-N
Fireman's Fund Insurance Company 1013-N

Fireman's Insurance Company 1014-N
Franklin Fire Insurance Company..... 1015-N
Girard Fire and Marine Insurance Company..... 1016-N
Granite State Fire Insurance Company..... 1017-N
Glens Falls Insurance Company..... 1018-N
Globe and Rutgers Fire Insurance Company..... 1019-N
Great American Insurance Company..... 1020-N
Hanover Fire Insurance Company..... 1021-N
Henry Clay Fire Insurance Company..... 1022-N
Harmonia Fire Insurance Company..... 1023-N
Hartford Fire Insurance Company..... 1024-N
Home Fire and Marine Insurance Company..... 1025-N
Home Insurance Company..... 1026-N
Hudson Insurance Company 1027-N
Imperial Assurance Company 1028-N
Insurance Company of North America..... 1029-N
Iroquois Fire Insurance Company..... 1030-N
Independence Fire Insurance Company..... 1031-N
Insurance Company of the State of Pennsylvania..... 1032-N
Law, Union and Rock Insurance Company, Ltd..... 1033-N
Lumbermen's Insurance Company 1034-N
Liverpool and London and Globe Insurance Company, Ltd., 1035-N
London Assurance Corporation 1036-N
London and Lancashire Fire Insurance Company, Ltd.... 1037-N
London and Scottish Assurance Corporation, Ltd..... 1038-N
Massachusetts Fire and Marine Insurance Company..... 1039-N
Maryland Insurance Company 1040-N
Mechanics Insurance Company 1041-N
Mechanics and Traders Insurance Company..... 1042-N
Merchants Insurance Company 1043-N

Mercury Insurance Company 1044-N
Mercantile Insurance Company of America..... 1045-N
Michigan Fire and Marine Insurance Company..... 1046-N
Milwaukee Mechanics Insurance Company..... 1047-N
Minneapolis Fire and Marine Insurance Company..... 1048-N
National Fire Insurance Company..... 1049-N
New York Fire Insurance Company..... 1050-N
New Brunswick Fire Insurance Company..... 1051-N
Netherlands Insurance Company 1052-N
New York Underwriters Insurance Company..... 1053-N
New England Fire Insurance Company..... 1054-N
National Ben Franklin Insurance Company..... 1055-N
National Liberty Insurance Company of America..... 1056-N
National Security Insurance Company..... 1057-N
National Union Fire Insurance Company..... 1058-N
New Hampshire Fire Insurance Company..... 1059-N
Newark Fire Insurance Company..... 1060-N
Niagara Fire Insurance Company..... 1061-N
North British and Mercantile Insurance Company, Ltd.... 1062-N
Northern Assurance Company, Ltd..... 1063-N
Norwich Union Fire Insurance Society, Ltd..... 1064-N
North River Insurance Company..... 1065-N
Northwestern Fire and Marine Insurance Company..... 1066-N
Northwestern National Insurance Company..... 1067-N
Old Colony Insurance Company..... 1068-N
Orient Insurance Company..... 1069-N
Philadelphia Fire and Marine Insurance Company..... 1070-N
Provident Fire Insurance Company..... 1071-N
Preferred Risk Fire Insurance Company..... 1072-N
Potomac Insurance Company..... 1073-N

Palatine Insurance Company, Ltd..... 1074-N
Patriotic Insurance Company of America..... 1075-N
Phœnix Assurance Company, Ltd..... 1076-N
Pennsylvania Fire Insurance Company..... 1077-N
Phœnix Insurance Company 1078-N
Providence Washington Insurance Company..... 1079-N
Queen Insurance Company of America..... 1080-N
Royal Exchange Assurance Company..... 1081-N
Royal Insurance Company, Ltd..... 1082-N
Reliance Insurance Company..... 1083-N
Rhode Island Insurance Company..... 1084-N
Safeguard Insurance Company..... 1085-N
Security Insurance Company..... 1086-N
Sun Insurance Office 1087-N
Svea Fire and Life Insurance Company, Ltd..... 1088-N
Springfield Fire and Marine Insurance Company..... 1089-N
Sentinel Fire Insurance Company..... 1090-N
Scottish Union and National Insurance Company..... 1091-N
Superior Fire Insurance Company..... 1092-N
The State Assurance Company, Ltd..... 1093-N
Standard American Fire Insurance Company..... 1094-N
Standard Fire Insurance Company..... 1095-N
Star Insurance Company of America..... 1096-N
St. Paul Fire and Marine Insurance Company..... 1097-N
Travelers Fire Insurance Company..... 1098-N
Transcontinental Insurance Company..... 1099-N
Twin City Fire Insurance Company..... 1100-N
Union Fire Insurance Company of Paris..... 1101-N
Union Assurance Society, Ltd..... 1102-N
Urbaine Fire Insurance Company..... 1103-N

United Firemen's Insurance Company..... 1104-N
United States Fire Insurance Company..... 1105-N
Victory Insurance Company of Philadelphia..... 1106-N
Western Assurance Company..... 1107-N
World Auxiliary Insurance Corporation, Ltd..... 1108-N
Western Fire Insurance Company..... 1109-N
World Fire and Marine Insurance Company..... 1110-N
Westchester Fire Insurance Company..... 1111-N

APPENDIX B.

In the District Court of the United States

FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

AGRICULTURAL INSURANCE COMPANY, a Corporation, *Plaintiff*,

vs.

WILLIAM R. BAKER, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMTIH, Attorney-general of the state of Kansas, *Defendants.*

Case No. 963-N

BILL IN EQUITY.

Now comes the above-named plaintiff, Agricultural Insurance Company, and for cause of action against defendants, William R. Baker, commissioner of insurance of the state of Kansas and William A. Smith, attorney-general of the state of Kansas, states:

FIRST.

Plaintiff is now and at all times herein mentioned was a corporation of a state other than the state of Kansas, and organized and existing under the laws of the state or country hereinafter named, as a stock fire insurance company, and has been engaged in the business of insurance in the state of Kansas by license to it issued from year to year by the state of Kansas, for more than fifteen years last past, and is authorized by its charter to do a business of fire,

lightning, hail, windstorm and allied lines of insurance usually done by fire insurance companies, and it, the plaintiff, is a citizen and resident of the state of New York. The defendant, William R. Baker, is now and at all said times was a citizen and resident of the state of Kansas, and of the district of Kansas, and residing in Shawnee county, and said defendant is and was at all said times duly appointed, qualified and acting commissioner of insurance of the state of Kansas.

Defendant, William A. Smith, is attorney-general of the state of Kansas, and as such attorney-general is the chief law-enforcing officer of said state, having supervision of the enforcement of the laws on behalf of the state against any person or corporation who may be claimed to have violated the law, and generally to enforce the law on behalf of said commonwealth; said William A. Smith is a resident and a citizen of the state of Kansas and of the district of Kansas aforesaid, residing in Shawnee county.

SECOND.

The court's jurisdiction depends upon the following grounds:

This is a suit of a civil nature in equity. The matter in controversy is of the value of $5,000 and exceeds, exclusive of interest and costs, the sum or value of $3,000; and

(1) arises under the constitution of the United States, namely, the order (hereinafter set forth) made by the then superintendent of insurance (who since the making of the order complained of has had the style of his office changed, and is now styled the commissioner of insurance) is asserted to be violative of the first section of the fourteenth amendment of the constitution of the United States, in that the same (*a*) denies to plaintiff the equal protection of the laws; (*b*) deprives the plaintiff of its property and liberty without due process of law;

(2) arises under the constitution of the United States, in that

plaintiff is deprived of property without due process of law by a certain section of the Statutes of Kansas, namely, Laws of 1909 of Kansas, chapter 152, section 3, which is section 40-463 of Revised Statutes of Kansas, 1923, which was the statute in force at the time of the making of the rate order complained of, and said section, as since that time amended and now styled section 40-913 of the insurance code of Kansas of 1927, Laws of Kansas, 1927, p. 346; and also Laws of 1909, chapter 152, section 9, being reported as section 40-469, Revised Statutes of Kansas, 1923, and said section as amended and appearing as section 40-919 of the insurance code of Kansas, 1927, Laws of Kansas, 1927, p. 347, which statute first above mentioned is the statute by virtue of which the authority of the commissioner of insurance to make the said order hereinafter complained of is asserted, and which said other section secondly above mentioned is the section by virtue of which power subsequent to making of rate order has been and is asserted and claimed. Said statutes and each of them, and the same as construed and applied, deprive the plaintiff of its property as hereinafter more specifically mentioned, without due process of law. Upon said statutes defendants rely in their claims of power and claims of supposed violation because of which they threaten to proceed and will proceed as hereinafter alleged, if not enjoined. Said statutes and each of them is void and violative of the first section of the fourteenth amendment of the constitution of the United States in that they (*a*) deny to plaintiff the equal protection of the law; (*b*) deprive plaintiff of its property and liberty without due process of law.

(3) is between citizens of different states, namely, the defendants and each of them are citizens of the state of Kansas and the plaintiff is a citizen of state of New York.

THIRD.

The facts are as follows:

Par. 1. Plaintiff is now and at all times herein mentioned was a stock fire insurance company engaged in the business of fire, lightning, hail and windstorm insurance, and authorized and licensed to do, and doing, said business in the state of Kansas.

In order to conduct its business in the state of Kansas, plaintiff has been obliged to establish, and did establish long before January 20, 1922, local agencies in the various cities and towns throughout the state, at large cost and expense, and the agencies so established are of great value. Without such agencies, so established, it would be impossible for the plaintiff to conduct its business of insurance in the state of Kansas, and said established agency plants of the plaintiff are of great value to the plaintiff, namely, of the value of $5,000.

Plaintiff has at great cost and expense made elaborate surveys and from such surveys has compiled elaborate maps, which are supplied to its agents and by them used in the writing of insurance in the state of Kansas. Said maps and surveys are of a reasonable value in excess of the sum of one thousand dollars.

In accordance with the requirements of section 40-461, Kansas Revised Statutes, 1923, and long before January 20, 1922, the plaintiff has compiled and does now maintain in the state of Kansas a public rating record, through medium of Kansas Inspection Bureau, including extensive maps, surveys and other data, comprehending the result of inspection of many thousands of parcels of insurable property in said state, from which the rate of premium applicable to each risk in this state may be ascertained in advance of the making of insurance thereon; such rating record includes general basis schedule, embodying basis rates, changes, terms, conditions, permits and standards, and such other data as are necessary for the computation and promulgation of equitable rates and rules of

practice. Such records show the forms and indorsements upon which each rate is predicated, and show the changes of rate to be made on account of each and every change of form or indorsement. Such rating records of plaintiff are of the value of more than $3,000.

Par. 2. At all times since the year 1909, the date of its enactment, there was in force a certain public law of the state of Kansas, namely, section 3 of chapter 152 of the Laws of 1909, published in Kansas Revised Statutes of 1923 as section 40-463, which is in words and figures following:

"*Superintendent to regulate rates:* When the superintendent of insurance shall determine that any rate made by an insurance company in this state is excessive or unreasonably high, or that said rate is not adequate to the safety or soundness of the company granting the same, he is authorized to direct said company to publish and file a higher or lower rate which shall be commensurate with the character of the risk, but in every case the rate shall be reasonable."

(The word "superintendent" was changed to read "commissioner" in 1927.)

And by section 9 of chapter 152 of Laws of 1909 of the state of Kansas, in force at all times hereinafter mentioned, published in Revised Statutes of Kansas, 1923, as section 40-469, it was provided as follows:

"*Rate regulation proceedings:* The superintendent of insurance shall not make any regulation or order without giving the insurance company concerned reasonable notice thereof, and an opportunity to appear and be heard in respect to the same; and if any insurance company, or any other person, city or municipality which shall be interested in said order shall be dissatisfied with any regulation, order or rate adopted by said superintendent of insurance, said party or parties shall have the right, within thirty days after the making of said regulation or order, to bring an action against said superintendent of insurance in any district court of the state of Kansas to have such regulation or order vacated, and shall set forth in the petition the particular regulation or order complained of and the

particular cause or causes of objection to any or all of them, and a summons shall be served upon the superintendent of insurance by delivering a copy thereof to his office at the state capitol, and such service may be had by the clerk delivering a certified copy of said summons by mail to the said superintendent of insurance at his office. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature; and the court may set aside, vacate or annul one or more or any part of any of the regulations or orders adopted or fixed by the said superintendent of insurance, which shall be by said court found to be unreasonable, unjust, excessive, or inadequate to compensate the company writing insurance thereon for the risk assumed by it without disturbing others. No injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the superintendent of insurance shall be granted: *Provided*, That the court may permit any company complaining under this act to write insurance at any rates which obtained prior to the ordering of the rate complained of, by the superintendent of insurance, upon condition that the difference between the rate complained of by the company and the rate at which it seeks to write insurance may be deposited with the superintendent of insurance, and on the final determination of the suit shall be paid by him to the insurance company, if the court shall find it entitled to the same, or to the holders of policies written by said company after the rate complained of was ordered by the superintendent of insurance, as the court may deem just and equitable. Whenever any action shall be brought by any insurance company under the provisions of this section within said period of thirty days, no penalties or forfeiture shall attach or accrue on account of the failure of the plaintiff to comply with the order sought to be vacated or modified in said action until the final determination of said suit. Either party to said cause, if dissatisfied with the judgment or decree of said court, may appeal to the supreme court as in other civil cases, and said court shall examine the record, including the evidence, and render such judgment as shall be just and equitable in the premises. No action shall be brought in any of the courts of the United States to set aside any order made by the superintendent of insurance under the provisions of this act before all of the remedies provided for herein shall have been exhausted by the party complaining. And if any company organized under the laws of the state, or authorized to transact the business of insurance in this state by the superintendent of insurance, shall violate this

section, the superintendent of insurance may cancel the authority of said insurance company to transact business in this state."

By section 10 of chapter 152 of Laws of 1909 of the state of Kansas, appearing in Revised Statutes of Kansas, 1923, as section 40-470, it is provided that in the event of any infraction of said act, or doing or permitting to be done any act contravening the same, that for each offense the offender shall be punished by fine not exceeding $100 for each offense. And plaintiff avers that the defendants will assert and claim that every issuance of a policy and every exaction of premium, if exacted contrary to the directions of the insurance commissioner as hereinafter set forth, will subject the plaintiff and its agents and representatives to such penalties.

And by section 1 of chapter 207 of Laws of 1917, at all times hereinafter mentioned in force, it was, amoung other things provided that —

"The superintendent of insurance upon written complaint of any citizen or upon his own motion is hereby empowered to investigate all fire insurance rates."

Par. 3. On the 20th day of January, 1922, Frank L. Travis, then superintendent of insurance, who has been succeeded in office by the defendant, William R. Baker, as superintendent of insurance, and the title of which office has since that time been changed by law to that of insurance commissioner (said offices bearing said different titles are the same identical office and not different offices), purporting to act under said statutes aforesaid, did promulgate an order in writing which was by him directed to W. C. Hodges, attorney in fact for all insurance companies authorized to transact business in the state of Kansas and subscribers to Kansas Inspection Bureau, of Topeka, Kansas, which order was made by him pursuant to an alleged or purported notice in said order recited, which said order of the then superintendent of insurance and the purported notice

pursuant to which the same is claimed to have been had, is in words and figures following:

ORDER ADJUSTING

FIRE INSURANCE RATES

Effective March 1, 1922

INSURANCE DEPARTMENT,
FRANK L. TRAVIS, *Superintendent*,
TOPEKA, KANSAS.

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INSURANCE DEPARTMENT OF KANSAS, TOPEKA.

To—— January 20, 1922.

W. C. Hodges, attorney in fact for insurance companies authorized to transact business in the state of Kansas and subscribers to the Kansas Inspection Bureau of Topeka, Kansas; and the—

Ætna Insurance Company, Hartford, Connecticut;
Agricultural Insurance Company, Watertown, New York;
Alliance Insurance Company, Philadelphia, Pennsylvania;
American Alliance Insurance Company, New York, New York;
American Automobile Insurance Company, Saint Louis, Missouri;
American Central Insurance Company, Saint Louis, Missouri;
American Druggists Fire Insurance Company, Cincinnati, Ohio;
American Insurance Company, Newark, New Jersey;
American Eagle Fire Insurance Company, New York, New York;
American Merchants Fire Insurance Company, Kansas City Missouri;
American National Fire Insurance Company, Columbus, Ohio;
Atlas Assurance Company, Limited, London, England;
Automobile Insurance Company, Hartford, Connecticut;
Boston Insurance Company, Boston, Massachusetts;
British America Assurance Company, Toronto, Ontario, D. C.;
Caledonian American Insurance Company, New York, New York;
Caledonian Insurance Company, Edinburgh, Scotland;
California Insurance Company, San Francisco, California;
Camden Fire Insurance Association, Camden, New Jersey;
Central States Fire Insurance Company, Wichita, Kansas;
Citizens Insurance Company, Saint Louis, Missouri;
City of New York Insurance Company, New York, New York;

Columbia Insurance Company of Jersey City, New York, New York;
Columbia National Fire Insurance Company, Lansing, Michigan;
Commercial Union Assurance Company, Limited, London, England;
Commercial Union Fire Insurance Company, New York, New York;
Commonwealth Insurance Company of New York, New York;
Concordia Fire Insurance Company, Milwaukee, Wisconsin;
Connecticut Fire Insurance Company, Hartford, Connecticut;
Continental Insurance Company, New York, New York;
County Fire Insurance Company of Philadelphia, Philadelphia, Pennsylvania;
Des Moines Reinsurance Fire Company, Des Moines, Iowa;
Detroit Fire and Marine Insurance Company, Detroit, Michigan;
Eagle Star and British Dominions Insurance Company, Limited, London, England;
Equitable Fire and Marine Insurance Company, Providence, Rhode Island;
Eureka Insurance Company, Philadelphia, Pennsylvania;
Federal Insurance Company, Jersey City, New Jersey;
Federated Fire Reinsurance Company, Mason City, Iowa;
Fidelity Phenix Fire Insurance Company, New York, New York;
Fire Association of Philadelphia, Philadelphia, Pennsylvania;
Fireman's Fund Insurance Company, San Francisco, California;
Firemen's Insurance Company, Newark, New Jersey;
Franklin Fire Insurance Company, Philadelphia, Pennsylvania;
Girard Fire and Marine Insurance Company, Philadelphia, Pennsylvania;
General Fire Assurance Company, Paris, France;
Glens Falls Insurance Company, Glens Falls, New York;
Globe and Rutgers Fire Insurance Company, New York, New York;
Great American Insurance Company, New York, New York;
Great Republic Insurance Company, Des Moines, Iowa;
Hanover Fire Insurance Company, New York, New York;
Hartford Fire Insurance Company, Hartford, Connecticut;
Hawkeye Securities Fire Insurance Company, Des Moines, Iowa;
Home Fire and Marine Insurance Company, San Francisco, California;
Home Insurance Company, New York, New York;
Hudson Insurance Company, New York, New York;
Imperial Assurance Company, New York, New York;
Interstate Fire Insurance Company, Detroit, Michigan;
Insurance Company of North America, Philadelphia, Pennsylvania;
Insurance Company of the State of Pennsylvania, Philadelphia, Pennsylvania;
Law Union and Rock Insurance Company, Limited, London, England;
Liverpool and London and Globe Insurance Company, Limited, London, England;

Liverpool and London and Globe Insurance Company, Limited, Liverpool, England;
London Assurance Corporation, London, England;
London and Lancashire Fire Insurance Company, Limited, Liverpool, England;
London and Scottish Assurance Corporation, Limited, London, England;
Marine Insurance Company, Limited, London, England;
Majestic Fire Insurance Company, Topeka, Kansas;
Marine and Motor Insurance Company, Galveston, Texas;
Massachusetts Fire and Marine Insurance Company, Boston, Massachusetts;
Marquette National Fire Insurance Company, Chicago, Illinois;
Maryland Motor Car Insurance Company, Baltimore, Maryland;
Mechanics Insurance Company, Philadelphia, Pennsylvania;
Mechanics and Traders Insurance Company, New Orleans, Louisiana;
Mercantile Insurance Company of America, New York, New York;
Michigan Fire and Marine Insurance Company, Detroit, Michigan;
Milwaukee Mechanics Insurance Company, Milwaukee, Wisconsin;
Minneapolis Fire and Marine Insurance Company, Minneapolis, Minnesota;
National Fire Insurance Company, Hartford, Connecticut;
National Ben Franklin Fire Insurance Company, Pittsburg, Pennsylvania;
National Liberty Insurance Company of America, New York, New York;
National Security Fire Insurance Company, Omaha, Nebraska;
National Union Fire Insurance Company, Pittsburg, Pennsylvania;
New Hampshire Fire Insurance Company, Manchester, New Hampshire;
Newark Fire Insurance Company, Newark, New Jersey;
Niagara Fire Insurance Company, New York, New York;
North American National Insurance Company, Des Moines, Iowa;
North British and Mercantile Insurance Company, London, England;
Northern Assurance Company, Limited, London, England;
Norwich Union Fire Insurance Company, Limited, Norwich, England;
North River Insurance Company, New York, New York;
Northwestern Fire and Marine Insurance Company, Minneapolis, Minnesota;
Northwestern National Insurance Company, Milwaukee, Wisconsin;
Omaha Liberty Fire Insurance Company, Omaha, Nebraska;
Orient Insurance Company, Hartford, Connecticut;
Palatine Insurance Company, Limited, London, England;
Patriotic Assurance Company, Limited, Dublin, Ireland;
Phœnix Assurance Company, Limited, London, England;
Pennsylvania Fire Insurance Company, Philadelphia, Pennsylvania;

Phœnix Insurance Company, Hartford, Connecticut;
Preferred Risk Fire Insurance Company, Topeka, Kansas;
Providence Washington Insurance Company, Providence, Rhode Island;
Queen Insurance Company, New York, New York;
Royal Exchange Assurance, London, England;
Royal Insurance Company, Limited, Liverpool, England;
Reliance Insurance Company, Philadelphia, Pennsylvania;
Retailers Fire Insurance Company, Oklahoma City, Oklahoma;
Rhode Island Insurance Company, Providence, Rhode Island;
Safeguard Insurance Company, New York City, New York;
Security Insurance Company of New Haven, New Haven, Connecticut;
Scandinavian American Assurance Corporation, Limited, Christiana, Norway;
Sun Insurance Office, London, England;
Svea Fire and Life Insurance Company, Limited, Gothenburg, Sweden;
Swiss Reinsurance Company, Zurich, Switzerland;
Springfield Fire and Marine Insurance Company, Springfield, Massachusetts;
Standard Fire Insurance Company, Hartford, Connecticut;
Star Insurance Company of America, New York, New York;
State Insurance Company, Des Moines, Iowa;
Sterling Fire Insurance Company, Indianapolis, Indiana;
St. Paul Fire and Marine Insurance Company, Saint Paul, Minnesota;
Sunflower Fire Insurance Company, Topeka, Kansas;
Twin City Fire Insurance Company, Minneapolis, Minnesota;
Union Insurance Society of Canton, Limited, Hong Kong, China;
Union Marine Insurance Company, Limited, Liverpool, England;
United Firemen's Insurance Company, Philadelphia, Pennsylvania;
United States Fire Insurance Company, New York, New York;
United States Lloyds Incorporated, New York, New York;
Victory Insurance Company of Philadelphia, Philadelphia, Pennsylvania;
Western Assurance Company, Toronto, Ontario, D. C.;
World Auxiliary Insurance Corporation, Limited, London, England;
Washington Marine Insurance Company, New York, New York;
Westchester Fire Insurance Company, New York, New York;

And all other insurance companies authorized to transact business in the state of Kansas and not specifically mentioned above, and which file their rates on all classes of risks insurable by such companies in this state in accordance with the provisions of sections 5363, 5364, 5365, 5366, 5367, 5368, 5369, 5370, 5371, 5372, and 5373 of the General Statutes of 1915:

ORDER.

1. In accordance with and by virtue of the authority vested in me as superintendent of insurance for the state of Kansas, under the provisions of sections 5363, 5364, 5365, 5366, 5367, 5368, 5369, 5370, 5371, 5372 and 5373, General Statutes of 1915, on the 10th day of August, 1921, I caused to be sent to W. C. Hodges, attorney in fact for insurance companies authorized to transact business in the state of Kansas and subscribers to the Kansas Inspection Bureau of Topeka, Kan., the following departmental order:

INSURANCE DEPARTMENT OF KANSAS,
TOPEKA.

August 10, 1921.

Mr. W. C. Hodges, attorney in fact, Topeka, Kan.:

(1) You are hereby notified, as attorney in fact, that there will be a hearing in the office of the superintendent of insurance for the state of Kansas, commencing at two o'clock p. m., Monday, October 17, 1921, and continuing as long as matters pertaining to the questions involved in the hearing are presented.

(2) The purpose of the hearing is:

(*a*) To determine whether the fire and tornado insurance rates applying to all classes of insurable property in this state can be reduced, and to what extent.

(*b*) To determine whether the hail insurance rates applying to all classes of insurable property in this state can be reduced, and to what extent.

(*c*) To determine upon a new basis for hail insurance coverage, and fixing maximum limits per acre.

(*d*) To determine method of protecting interest of various persons insured under hail policies, eliminating the writing of policies to protect each interest.

(3) You will, as attorney in fact for the insurance companies, advise officials of said companies of this hearing, the date, scope and purpose of same, and that they will be in attendance either in person or by authorized representatives.

(4) You will be advised later as to the data and information to be furnished at this hearing by the companies interested.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at the city of Topeka, this 10th day of August, 1921. (Signed) FRANK L. TRAVIS,
Superintendent of Insurance.

2. At the time and place as provided for in said order as set forth above, to wit, on the 17th day of October, 1921, at two o'clock p. m., in the office of the superintendent of insurance for the state of Kansas, at Topeka, Kan., personally appeared W. C. Hodges, attorney

in fact for insurance companies authorized to transact business in the state of Kansas, and subscribers to the Kansas Inspection Bureau of Topeka, Kan., and the companies specifically named in the caption of this order, appearing by their counsel, Thomas Bates, Seymour Edgerton, A. R. Bates and John L. Hunt; and by J. V. Parker and R. D. Hobbs, manager and assistant manager, respectively, of the Western Actuarial Bureau; and on the said 17th day of October, 1921, and on the 14th day of December, 1921, to which later date the said hearing was adjourned by direction of the superintendent of insurance for the state of Kansas, the said W. C. Hodges, attorney in fact for insurance companies authorized to transact business in the state of Kansas and subscribers to the Kansas Inspection Bureau of Topeka, Kan., and the companies specifically named in the caption of this order, appearing by their counsel, John L. Hunt, and J. V. Parker and R. D. Hobbs, manager and assistant manager, respectively, of the Western Actuarial Bureau, presented for the consideration of the superintendent of insurance for the state of Kansas oral and writeen evidence, which said evidence was material and pertinent to the matters to be determined at said hearing as set forth in paragraph 2 of the departmental order dated August 10, 1921, and which said order is set forth in paragraph 1 of this order.

3. Now, therefore, after having given careful consideration to such evidence, including all schedules and other printed and written reports submitted by said W. C. Hodges, attorney in fact for insurance companies authorized to transact business in the state of Kansas, and subscribers to the Kansas Inspection Bureau of Topeka, Kan., and by Thomas L. Bates, Seymour Edgerton, A. R. Bates and John L. Hunt, counsel, and J. V. Parker and R. D. Hobbs, manager and assistant manager, respectively, of the Western Actuarial Bureau, and schedules, tabulations and other data compiled from the records now on file in the Insurance Department of the state of Kansas, I am of the opinion that the rates on certain classes of risks, as shown by the schedules filed in this department, are inequitable, unjust and not commensurate with the character and hazards of such risks, and that certain reductions, increases and changes must be made in order that said rates may be equitable, just and commensurate with the character and hazards of such risks, and in order that the solvency of insurance companies transacting business in this state be maintained, and that each class of insurance be made to carry its proper rate.

4. You and each of you are hereby directed to publish and file with this department such changes in rates as are specifically set forth in the following schedule, showing the changes in the rate which has been determined by this department as being equitable, just and commensurate with the character and hazard of the risk as set forth in said schedule:

SCHEDULE

Showing the classification on which no changes of rates are ordered, and classification on which increases in rates and decreases in rates are ordered.

Class on which no changes in rates are ordered:

Buildings of all classes of construction and contents, whether specifically rated or not, as follows, to wit:

Dwellings and their outbuildings, private boarding houses, fraternity and sorority houses, flats, tenements and apartments, nurses' and sisters' homes (not to include school dormitories; combined old class Nos. 1, 2, 9, 10, 11, 12, 21, 22), all classes of construction, building or contents.

Cereal, grist, feed, rice and flour mills, Nos. 370, 420, 436, 488, all classes.

Cotton, no compressing Nos. 255, 256.

Cotton compresses and warehouses and platform communicating therewith (No. 626).

Cotton yards and platforms not communicating (No. 628).

Cotton gins (No. 402).

Seasonal cottages and their outbuildings (Nos. 13, 14).

Wharf risks, ferry houses (No. 197).

Hail.

Riot and civil commotion.

Registered mail.

Marine and inland (other than automobile).

War and explosion.

Tourist floater, including baggage.

Rain, flood, frost and snow.

Classifications on which a reduction of twenty per cent in the rates is ordered:

Buildings, all classes of construction, and contents, whether specifically rated or not, as follows, to wit:

Mercantile buildings:

101. Mercantile buildings.

103. Mercantile buildings with wholesale occupancy exclusively.

168. Offices and banks, telephone exchanges, buildings and contents.

200. Mercantile buildings, retail occupancy, with dwellings only above grade floor.

606. Barns and stables (public)—livery, sales, bus, express, hotel and boarding.

620. Club houses (city, Y. M. C. A., Y. W. C. A., gymnasiums, and hotels and boarding houses all the year around.)

622. Club houses (country), boat and bath houses, yacht and rowing clubs, hotels and boarding houses (summer or winter only).

636. Garages (public).

680. Theaters and opera houses, moving-picture houses.

Mercantile contents:

102. Mercantile stocks—agricultural implements, automobile and carriage salesrooms.

110. Mercantile stocks—boots and shoes, retail.

112. Mercantile stocks—boots and shoes, leather goods (hides, harness and trunks), rubber goods, wholesale.

114. Mercantile stocks—clothing, hats, caps, furs and men's furnishings, retail merchant tailor, regalia, customer and dressmaking.

116. Mercantile stocks—clothing, hats, caps, furs and men's furnishings, wholesale.

124. Mercantile stocks—drugs, chemicals and medicines, retail.

126. Mercantile stocks—drugs, chemicals and medicines, wholesale.

128. Mercantile stocks—dry goods, woolens, carpets and notions, Chinese and Japanese goods, retail.

130. Mercantile stocks—dry goods, woolens, carpets, and notions, Chinese and Japanese goods, wholesale.

132. Mercantile stocks—furniture, musical instruments, music, undertakers' establishments, photographers' supplies, optical and scientific goods, retail.

136. Mercantile stocks—groceries, meat, fish, butter, cheese, eggs, fruit and produce, retail.

138. Mercantile stocks—groceries, meat, fish, butter, cheese, eggs, fruit and product, wholesale.

140. Mercantile stocks—hardware, iron and steel bars and piping,

cutlery, surgical instruments, machinery, belting, mill-equipment supplies, stoves, tinware, house furnishings, wooden, willow and basketware, retail.

142. Mercantile stocks—hardware, iron and steel bars and piping, cutlery, surgical instruments, machinery, belting, mill-equipment supplies, stoves, tinware, house furnishings, wooden, willow and basketware, wholesale.

146. Household furniture in mercantile buildings.

154. Mercantile stocks—liquors and wines, wholesale.

156. Lodge and society rooms (Masonic, Odd Fellows, etc.).

160. Mercantile stocks—miscellaneous, wholesale and retail.

164. Mercantile stocks—millinery, feathers, artificial flowers, wholesale.

176. Restaurants.

184. Stores, country (remote or crossroad), usually of moderate or small values, buildings and contents.

186. Stores, general (village or city), including department stores.

196. Mercantile stocks—tobacco, cigars, smokers' articles, wholesale.

254. Cold storage.

260. General storage, not specifically classed.

266. Fibers (other than cotton and wool and tobacco).

268. Household furniture.

280. Wool.

Unless otherwise specifically directed elsewhere in this order, a reduction of twenty per cent in rates is ordered on all other mercantile buildings and contents not mentioned above.

Classifications on which a reduction of fifteen per cent in the rates is ordered:

Buildings, all classes of construction, and contents whether specifically rated or not, as follows, to wit:

Miscellaneous manufacturing risks:

324. Heavy metal workers generally—foundries for iron, brass type work and stoves; furnaces, rolling mills, machine shops (with foundries connected), boiler shops, nut and bolt works, bicycle and firearms, factories, locomotive works, wireworking and drawing machine shops without foundries.

326. Light metal workers generally—hardware factories for manufacturing cutlery, copper or brassware, axes, tools, nails, tacks,

pins and needles; also clock factories, if no woodworking; jewelry, watch, dental, scientific and surgical-instrument factories, miscellaneous metal workers not otherwise specified; silver, aluminum and tableware factories; electroplating.

338. Stamping works—tin, hollow ware, iron bedstead, gas fixtures, lamp and iron toy factories, japanneries.

346. Bakeries and macaroni factories.

350. Bleacheries, dye and print works.

352. Boot, shoe, slipper, heel and counter factories.

354. Breweries.

356. Brush and broom factories.

358. Canneries—canning and preserving works for fruit, vegetables and fish.

366. Celluloid works—celluloid and celluloid goods factories.

368. Cement mills.

372. Chemical works of the milder hazards.

374. Chemical works of hazardous nature or with explosive hazard.

386. Clothing, cap and overall factories; tent, awning, sail and rigging lofts.

394. Collar, cuff, shirt, corset, waist and other white-goods factories.

396. Confectionery, chocolate and chewing-gum factories.

404. Cotton mills (full process).

406. Creameries, powdered and condensed milk, caseine and cheese factories.

412. Distilleries and rectifying works (steam).

418. Fertilizer and phosphate factories.

424. Fur hat, fur cutting, forming and dressing mills.

426. Glass works.

438. Hemp and jute mills, cordage and bagging factories, waste and shoddy mills; carpet, lining and batting factories.

442. Ice factories.

446. Laundries (hand or power), cleaning establishments.

450. Leather goods factories (except boot and shoe), such as harness, saddlery, pocketbook, glove, bag, leather trunk, whip and sporting goods.

452. Malt houses.

460. Miscellaneous manufacturing establishments not otherwise classified.

474. Packing houses, slaughtering, rendering, oleomargarine, lard, candles, crude glycerine and glue works.

476. Paint, varnish, white-lead and oil-color works, turpentine refineries, printing-ink works.

480. Paper, pulp, leather-board and straw-board mills.

484. Potteries, brick, tile, plaster and crucible works; china decorating.

486. Printing establishments, lithographers, book binderies.

490. Rubber mills, including manufacture of rubber goods and clothing.

492. Salt works.

494. Silk mills.

498. Soap factories (when insured separately from packing houses or other plants).

502. Sugar houses.

504. Sugar (cane and beet) refineries.

506. Tanneries (heavy leather).

508. Tanneries (light leather, currying shops, morocco works and leather-making generally without japanning).

510. Tanneries (light), with japanning or enameling.

514. Tobacco, cigar, cigarette and snuff factories.

522. Weaving and knitting mills, no preparatory process; embroidery and lace-curtain factories.

526. Wineries.

528. Woolen mills (full process, all wool or mixed stocks)—worsted, carpet, knitting, felting, wool-hat factories.

654. Marble and stone yards with power and mills (not stone crushers).

Unless otherwise specifically directed elsewhere in this order a reduction of fifteen per cent in rates is ordered on all other miscellaneous manufacturing risks, building and contents not mentioned above.

Classification on which a reduction of fifteen per cent in rates is ordered:

Buildings, all classes of construction, and contents, whether specifically rated or not, as follows, to wit:

416. Electric-light and power plants (when separately insured), water-works and pumping stations, filtration plants.

617. Builders' risk—buildings in process of construction.

624. Coal and wood yards, coal trestles.

630. Exhibition buildings, carrousels, rinks, fairgrounds, race tracks, ballgrounds, and similar amusement properties.

642. Hay presses and barns.

648. Ice storage houses.

654. Marble and stone yards with power and mills (not stone crushers).

656. Miscellaneous nonmanufacturing specials not otherwise classified.

672. Steamers, vessels, tugs, ferry boats, marine dredges, yachts; shipping in port or laid up.

674. Stockyards.

702. Floaters, except automobile and cotton.

706. Cotton, all classes not otherwise provided for, including floaters.

Unless otherwise specifically directed elsewhere in this order, a reduction of fifteen per cent in rates is ordered on all miscellaneous risks, building and contents not mentioned above.

Classification on which a reduction of fifteen per cent in rates is ordered:

Buildings, all class of construction, and contents, whether specifically rated or not, as follows, to wit:

Woodworkers' risks:

300. Agricultural-implement factories and other factories having woodworking (principally hard) in conjunction with iron work, painting, etc., such as carriage, bed springs, incubator, refrigerator, sewing machines, wringer factories and car works.

302. General woodworking, without power, including carpenter and cabinet shops, looking-glass and picture-frame factories, and cooper shops.

304. General woodworking, with power and without finishing—chair, pail, tub, tank, bobbin, ladder, wooden-toy factories, match factories, molding, turning, wheel, hub, spoke and spool factories, and carpenter shops with power.

306. Furniture, organ, piano, graphophone, rattan, wooden-trunk, casket, and billiard-table factories and clock factories, if with woodworking.

308. Marine railways, shipyards, boat building, dry docks.

316. Planing mills, sash, door, blind and wooden-box factories, and dry houses for lumber.

318. Sawmills.

320. Shingle, stave, lath, veneer and kindling-wood mills and excelsior factories, and all other woodworking risks.

429, 430, 431, 432. Grain elevators and warehouses, all classes (excluding fireproof), buildings and contents.

Unless otherwise directed elsewhere in this order, a reduction of fifteen per cent is ordered on all other woodworkers' risks, grain elevators and warehouses, building and contents, not mentioned above.

Cassification on which a reduction of ten per cent in rates is ordered:

All classes of construction and contents as follows, to wit:

Tornadoes, windstorm and cyclone, excepting Nos. 1, 2, 9, 10, 11, 12, 16, 21, 22, as outlined by the National Board of Fire Underwriters for the standard classification for occupancy hazards.

Use and occupancy.

Rent, leasehold, commissions and profits.

Farm risks, buildings and contents, including live stock.

Farm-tenant occupancy charge.

The charge for tenant occupancy of twenty-five cents for one year, fifty cents for three years, and seventy-five cents for five years is hereby abrogated, and filings will be made showing the elimination of this charge for tenant farm occupancy.

Classification on which an increase of fifteen per cent in rates is ordered:

Buildings, all classes of construction, and contents, whether specifically rated or not, as follows, to wit:

Public buildings:

4. Churches and chapels and other public buildings.

6. City and town halls, courthouses, state capitals, armories, fire-department houses, libraries (public), museums of art and natural history.

8. Colleges, universities, boarding schools, convents, schools and academies, with or without dormitories.

24. Hospitals, sanatoriums, asylums (deaf, dumb, blind and orphan), homes for the aged.

694. Asylums, insane and inebriate, poor farms and alms houses, jails, prisons, penitentiaries and reform schools, and all other educational and charitable institutions.

430. Grain elevators and warehouses, fireproof construction, country and terminal buildings and contents.

Unless otherwise specifically directed elsewhere in this order, an increase of fifteen per cent in rates is ordered on all other public buildings and contents not mentioned above.

Classification on which an increase of fifteen per cent in rates is ordered:

Buildings, all classes of construction, and contents, whether specifically rated or not, as follows, to wit:

Mining properties:

458. Mining risks (other than coal, including mining dredges), an increase of ten per cent, building and contents.

388. Coal breakers and mining buildings, anthracite—an increase of ten per cent, building and contents.

390. Coal tipples and top works, bituminous—an increase of ten per cent, building and contents.

Oil risks (mineral or earth):

470. Oil works, mineral refineries, oil derricks and pipe lines—an increase of ten per cent, building and contents.

Oil risks (vegetable and fish):

464. Oil works, vegetable.

466. Oil, vegetable, and tanks.

468. Oil works, fish—an increase of ten per cent, building and contents.

Unless otherwise specifically directed elsewhere in this order, an increase of ten per cent is ordered on all other mining properties and oil properties and contents not mentioned above.

Classification on which an increase of forty per cent is ordered:

Buildings, all classes of construction and contents, whether specifically rated or not, as follows, to wit:

Railway (steam):

670. Steam railway risk, all classes (excluding merchandise for other parties in freight houses).

Tobacco warehouses, sales houses, stemmeries, prizeries and rehandling houses:

516. Tobacco stemmeries, prizeries and rehandling, all classes buildings and contents.

682. Tobacco barns (country), building and contents.

Unless otherwise directed elsewhere in this order, an increase of forty per cent is ordered on all other railway (steam) risks, build-

ings, and contents, tobacco warehouses, sales houses, stemmeries, prizeries, and rehandling houses, building and contents, not mentioned above.

Classification on which an increase of twenty-five per cent in rates is ordered:

Buildings, all classes of construction, and contents, whether specifically rated or not, as follows, to wit:

Street railway and traction properties:

670. Street-railway and traction properties, including storage and operating houses, building and contents.

Unless otherwise directed elsewhere in this order, an increase of twenty-five per cent is ordered on all other street-railway and traction properties, building and contents not mentioned above.

Items and numbers of the standard classification of occupancy hazards adcpted by the National Board of Fire Underwriters used in this schedule:

Classification on which an increase of fifteen per cent is ordered:

Building, all classes of construction, and contents, as follows, to wit:

Sprinklered risks, all classes, building and contents.

Sprinkler leakage, on contents only.

Unless otherwise directed elsewhere in this order, an increase of fifteen per cent is ordered on all other sprinkled risks, building and contents and sprinkler leakage risks not mentioned above.

Automobile insurance:

The following specific increases in the rates are made on each class as follows, to wit:

Automobile fire—an increase of fifty per cent.

Automobile theft—an increase of seventy-five per cent.

Automobile property damage—an increase of fifty per cent.

Automobile collision—an increase of fifty per cent.

Automobile transportion—an increase of twenty-five per cent.

Crop insurance:

An increase in rate is ordered on the following class:

Crop insurance—an increase of twenty per cent.

The computation of such increases and decreases in rates provided for in this order shall be based upon the rates made from the schedules now in effect and on file in the Insurance Department of

the State of Kansas on the date of this order, and all filings of rates and changes in rates made in accordance with this order shall show the rate now in effect, the percentage of increase or decrease in the rates, and the net rates after such increase or decrease in the rates has been made.

This order shall take effect and be in full force on and after the first day of March, 1922.

In testimony whereof, I have hereunto subscribed by name and affixed my official seal. Done at the city of Topeka, Kansas, this 20th day of January, 1922.

FRANK L. TRAVIS,
Superintendent of Insurance.

Par. 4. Thereafter, in February, 1922, purporting to act under said section 40-469, R. S. Kansas 1923, the stock fire insurance companies, more than 130 in number, comprising all of the stock fire insurance companies then doing business in Kansas, including this plaintiff, filed a joint review proceeding to review such rate reduction order as so jointly made and considered, which case was considered on appeal by the supreme court of Kansas, which did sustain said order as against said joint review proceeding and did justify said order of the commissioner, in which cause unconstitutional invasion of rights of this plaintiff as hereinafter set forth were not nor could they be considered, which said order was so in said cause justified as follows:

(*a*) It was there held that the standard of measurement of aggregate profit of all stock fire insurance companies in the state of Kansas during the antecedent test period, whereby to limit their aggregate collections and restrict their aggregate earnings for the future upon their business of fire insurance should be based upon adoption of the amount of written premiums or premiums received as income, and losses and expenses paid considered as outgo, which basis was also the basis employed and adopted by the commissioner, in making his said order, thereby taking into account as income unearned premiums covering prepayment for liability of the future extending

beyond the test period adopted and beyond the date of said rate order, and rejecting as outgo losses and expenses incurred but not yet paid although liability for the same was firmly fixed during such test period, which test period adopted in said review proceeding was a period of ten years upon the aggregate and three years upon classes.

(*b*) It was sustained as an appropriate exercise of power in that the equitable or just character of allocation of rates was justified although said statutes do not specifically give such power, and no guide or rule for its application is by law provided.

Thereafter, in February, 1922, purporting to act under said section 40-469, R. S. Kansas 1923, the stock fire insurance companies doing business in the state of Kansas, being more than 130 in number, and including this plaintiff, filed a joint review proceeding, to review the order so made and addressed to fire insurance companies jointly; which said review proceeding was a joint proceeding to review said joint order; which said cause was considered on appeal by the supreme court of Kansas, which did hold said rate order to be warranted as against such review proceeding, in which said cause the unconstitutional invasion of the rights of the plaintiff (as hereinafter more fully set forth) were not, nor could the same in said action be considered or determined; which said rate order, as so justified by the supreme court of Kansas, was justified upon considerations as follows:

(*a*) Said rate order was justified upon the basis that the proper standard therein to be applied for measurement of aggregate profit of all stock fire insurance companies in the state of Kansas during antecedent test period as a test for the future and whereby to limit the aggregate collections and restrict the aggregate earnings of fire insurance companies on their business of fire insurance, should be based upon the adoption of the amount of written premiums or

premiums received as income, and losses and expenses considered as outgo, which said basis of written or received premiums as income and paid losses and expenses as outgo was also the basis by the superintendent employed in making his said rate order. By said process so employed there was thereby in such rate order, as so justified, taken into account as income unearned premiums covering prepayment for liability of the future extending beyond the test period adopted and beyond the date of said rate order and rejecting as outgo losses and expenses incurred but not yet paid, although liability for the same was firmly fixed during said test period, which said test period so adopted and justified was a period of ten years respecting the aggregate of said business, and a period of three years upon the classes comprehended therein and as to which the said rate order was directed.

[The experience of all stock fire insurance companies in the state of Kansas, in the aggregate, upon their business of fire insurance for the years 1912 to 1921 inclusive, being the period of ten years immediately prior to the said rate order, without said rate order applied, was as follows:

Premiums earned		$49,342,631
Losses incurred	$26,198,088	
Expenses incurred	21,540,435	47,738,523

Plaintiff further states that charge for conflagrations properly to be considered as outgo for said term is $1,598,375. Profit of all companies, in the aggregate, was $5,733.

Plaintiff states that the written premiums for said period (whereby are taken into account the portion of the premiums unearned) exceeded said earned premium figures for said period by about $4,000,000, and losses and expenses paid are about $1,000,000 less than said items incurred.

Plaintiff further states that the business of fire insurance is a

distinct and separate class of insurance and was so by the defendant superintendent considered, and so considered and construed by the courts of Kansas.]

(*b*) Said order was further justified by taking into account as income, to ascertain aggregate experience of all companies during said test period, all income by them derived from the investment of capital, surplus and unearned premiums, or in other words from all their invested assets, and allocating the same to the state of Kansas by taking into consideration as income such ratable part of such earnings as their Kansas premiums during such period bore to their premiums throughout the United States, which said sum which was to taken into account by the superintendent and was by the court so taken into account as supposed income, was in the amount of many millions of dollars.

(*c*) Said order was justified by rejecting from consideration the value of the service rendered and rejecting from consideration the cost of service and rejecting the reasonable value of indemnity and rejecting any base of compensation for hazards undertaken as any basis for said order and by adoption of a base of return on capital and surplus although not employed or existing in the state of Kansas.

Par. 5. After entry of final judgment in the supreme court of Kansas as aforesaid, in the year 1927, the stock fire insurance companies, petitioners in said review proceeding, inclusive of this plaintiff, jointly applied to the supreme court of the United States for a writ of certiorari to review said judgment of the supreme court of Kansas, which application was denied.

Par. 6. To avoid a confiscation of the property of the plaintiff and to avoid compliance with the said rate order, and as a condition unlawfully imposed by the state of Kansas and orders of the district

court of Shawnee county, in which such review proceedings were originally initiated and lodged, the plaintiff did deposit with the defendant, the commissioner of insurance, large sums of money representative of the difference between the rates of premium upon fire insurance theretofore exacted and those directed and ordered to be thereafter exacted at lower rates, in a large sum of money; namely, the plaintiff did deposit and lodge with the said defendant, then superintendent and now styled commissioner of insurance, the sum of $14,324.38, which said sum of money, together with interest and increment thereof by him derived upon investment thereof (the exact amount whereof the plaintiff has no knowledge), is still retained by and held by the said defendant, commissioner of insurance, and under his direction and control, and which he withholds from plaintiff because of said void statutes and void rate order aforesaid, and in addition to said deposits of money so by the plaintiff made to assure its power and responsibility to make refund to policyholders if it should be lawfully required so to do, the plaintiff was further unlawfully required and compelled by order of the said court, and demand of defendant commissioner, purporting to act pursuant to said statutes aforesaid, to execute bond payable to the defendant, commissioner of insurance, for the indemnity of policyholders and to insure the ability and power of the plaintiff to make refunds if necessary, representative of the difference between rates of fire insurance premium charged by the plaintiff at preëxisting rates in excess of those directed and ordered by said commissioner; namely, the plaintiff did execute bond in the penal sum of $10,081.89, with Metropolitan Casualty Insurance Company as surety, on or about the month of February, 1928, and deposited and delivered to the said defendant in the month of March, 1928, the condition of which said obligation was and is as follows:

"Now the condition of the foregoing obligation is such, that whereas, the principal above named, has from September 1, 1925, to October 31, 1927, inclusive, charged and collected rates of premium upon policies of fire and incidental insurance in the state of Kansas in excess of the rates ordered by the superintendent of insurance by his order of January 20, 1922.

"Now, the condition of this obligation is such that if upon the final determination of this suit the said insurance company, principal above named, shall repay such differences in rates collected by it upon policies written during the said period mentioned to policyholders from which it has collected such differences in rates, within ninety (90) days after final determination of this suit, in any court in which the same may finally be lodged, in the event that it, the said principal, does not finally prevail in said suit, and provided further, that within said period of ninety days from the final determination of said suit, in the event that it, the said principal, does not prevail in said suit, and in the event that it shall not have paid such differences to any policyholder entitled thereto, that it shall then forthwith pay to the commissioner of insurance such differences in rates not thus repaid to policyholders, then this obligation to be void, otherwise to remain in full force and effect."

Par. 7. Prior to the making of said rate order of January 20, 1922, and since, plaintiff and other stock fire insurance companies doing business in Kansas did, each and all, write policies of fire insurance upon uniform rate charges upon hazards in said state, the level of rates being fixed by basis rates and creation of relativity and equality in rates throughout the state dependent upon the hazards involved in the several risks, and so did through the medium of Kansas Inspection Bureau, which made filings thereof for each stock fire insurance company doing business in the state of Kansas, including the plaintiff. The effect of said filings was to place the charge for insurance by stock fire insurance companies in Kansas upon a uniform level of rates, which method and manner of making and creating rates was long prior to that time sanctioned and directed by the statutes of Kansas and by approval of the Insurance Department. In addition to basis rates and schedules, specific rates or

local tariffs were also made and published respecting a great number of parcels of insurable property in the state, which property was inspected and valued and rates published upon the same, which said publications were uniform as to all stock fire insurance companies in the state, including the plaintiff, and likewise published and validated by law as aforesaid.

The level of rates existing at the time of the making of said rate order by the defendant, commissioner of insurance, aforesaid, as the same existed immediately before the making of his rate order, was and is equitable, nondiscriminating and fair and just to the public and insurance companies, and as so altered and changed by said rate order, if applied, would be unequitable, discriminatory, unfair and unjust to the public and to plaintiff and confiscatory as to plaintiff. The preëxisting rate level has not been departed from, but has been maintained and continued respecting charges for fire nsurance to the present time by the plaintiff and other stock fire nsurance companies doing business in the state, and money im-ounded and bonds given as aforesaid to warrant and guarantee the esponsibility of the plaintiff to make refunds if it be lawfully re-uired so to do.

Par. 8. Said defendants, the commissioner of insurance and the ttorney-general of Kansas, and other persons acting through, for nd in their name, will, unless restrained and enjoined by this court, sert the validity of said rate-reduction order and the power of the fendant commissioner of insurance to make said rate order, and application to plaintiff, and will assert such power under the atutes aforesaid, and will bring, or cause to be brought many ndreds of suits on the part of or for the benefit of policyholders, d assert claims of hundreds of policyholders against the plaintiff, o had policies of insurance and will pay out and deliver the said ounded monies to divers persons and assert and claim dominion

thereof, and will assert and claim the right to deliver the same to divers policyholders or former policyholders of the plaintiff and to subject the same to divers claims and demands of the said defendants and others, and will sue the plaintiff and the surety upon its bond aforesaid to enforce the penalty thereof.

Par. 9. Plaintiff states that the effect of said rate order as originally prescribed was to accomplish a reduction of income of the plaintiff upon its business of fire insurance compared to what it would otherwise be, in excess of five per cent, and if the same were placed in effect and applied to and enforced against the plaintiff and the plaintiff be required to put such reductions in force, the plaintiff would be required by such action and by the filing of schedules to make effective said order, to write insurance at such reduced level and the premiums by it collected since the date of such rate order upon the business of fire insurance would be reduced to the extent of said impounded monies and other sums in addition, amounting upon the whole to greatly more than five per cent upon its premiums of fire insurance, and reduce the premium charges of the plaintiff in the state of Kansas to an amount wholly inadequate to meet losses and reasonable expenses or to give reasonable compensation or any compensation to the plaintiff for assuming risks of fire insurance upon the divers classes upon which reductions are so ordered, and would place the risks of the plaintiff upon a basis of gross inequality and cause the plaintiff to write some risks at rates much less than other risks involving and having the same hazards, and destroy the vast machinery which has been built up by the plaintiff and other insurance companies for placing risks upon equality, and would cause the same to be so unequal as to subject the plaintiff to prosecution on the ground of discrimination, and that to remove such discrimination the commissioner of insurance would cause and command the plaintiff to reduce divers other charges upon

other hazards respecting which no reduction order is made, to place the same upon a basis of equality with those upon which reductions are so ordered.

And plaintiff further avers that divers parts of said rate order were by the courts of Kansas held to be void and beyond the jurisdiction of the insurance commissioner, and in particular did hold void and beyond his powers certain increases of rates of insurance upon automobiles and crop insurance and sprinkler leakage insurance, whereby and by which elimination of parts of said order the entire intent of said order was destroyed, namely, that increases designed and intended to offset decreases in said order were nullified and thereby a further and greater decrease in the income of the plaintiff was produced by nullification of parts of said rate order because of unwarranted assumption of power by the commissioner of insurance whereby the balance and the intent thereof was nullified.

Wherefore the plaintiff says that by the said statutes and by said rate order thereunder as the same was finally justified and as the same remained after the court's modification thereof and as the same now exists, it, the plaintiff, is compelled and forced if same be applied to it to do business of fire insurance in the state of Kansas at an actual loss and upon inequality of rate charges as between different risks and at an actual loss to the plaintiff and at great disturbance and loss to the rating structure so built up by the plaintiff at great cost, or alternatively, to withdraw from doing the business of fire insurance in Kansas, whereby the value of its many agency contracts and its agency plants and good will and established business, maps, surveys and records bearing upon its business of fire insurance which it, the plaintiff, has established in Kansas at great cost and expense and which are of value only if it continues doing such business in Kansas, and which are reasonably worth more than

$5,000, will be entirely destroyed. In either alternative, the plaintiff will be deprived of its property without due process of law by said rate reduction order as so justified aforesaid, in violation of section 1 of the fourteenth amendment of the constitution of the United States and in violation of section 1 of the bill of rights of the constitution of the state of Kansas.

Par. 10. By the term "writtten premiums," as herein employed, is meant all the premiums stipulated in policies executed during a specified period, including earned and unearned portions thereof. By "expenses and losses paid" is meant those losses and expenses paid during the period, not taking into account losses and expenses incurred for which liability exists but which have not in fact been paid during such period. By "earned premiums" is meant the premiums paying for insurance in force during the specified period, whether written before or during such period. By "incurred losses and expenses" is meant expenses and losses for which liability becomes firmly fixed during the period, whether paid or unpaid.

A method of profit or loss accounting by taking earned premiums as an element of income and incurred losses and expenses as elements of outgo is sound, and that treating written premiums as an element of income and paid losses and expenses as an element of outgo without provision for unearned premium and taking into account loss and expense items paid but applicable to other periods is an unsound method of accountancy, the balance upon which in no way discloses profit or loss.

Upon the measure of its individual experience (taking into account earned premiums as an element of income and incurred loss and expense as elements of outgo during the ten-year period or any other reasonable period before the date of the rate order and during the period since that time) plaintiff has, during each such period, lost money and made no money whatsoever upon the conduct of its busi-

ness of insurance or upon its business of fire insurance in the state of Kansas and has made less than a reasonable profit.

To reduce the rates of premium upon its business so by it conducted at a loss, as is done by said rate order and justified by said statutes as construed and sought to be applied to plaintiff, and thereby increase the loss which it will sustain thereon, may not be justified by taking a balance as between written premiums and paid losses and expenses as applied to the aggregate experience of all companies in the state for ten-year test period and upon striking a favorable balance by employment of such method to thereby justify a further and additional reduction of income of the plaintiff for the future.

If said reduction order should be applied to business of fire insurance conducted by plaintiff, it would reduce the rates of premium to be charged by plaintiff in Kansas to so low a level as to take away all allowance for the conflagration hazard and all profit, and compel plaintiff, if it continues doing business, to do so at a loss, and permit plaintiff to receive no compensation whatever, whereby it will be deprived of its property without due process of law in violation of said section 1 of the fourteenth amendment to the constitution of the United States and section 1 of the bill of rights of the constitution of Kansas.

Par. 11. Said rate reduction order was made by the superintendent (now commissioner) of insurance and justified by the supreme court of Kansas upon the basis of consideration of aggregate profit of all stock fire insurance companies doing business in the state of Kansas, and that their profits upon their business of fire insurance was in excess of what is reasonable and the individual experience of it, the plaintiff, was in no wise considered by the defendant superintendent (commissioner), wherefore the plaintiff says that there was no evidence warranting or in anywise entitling the said superintendent (commissioner) of insurance to make any order as to, or

apply the same to the business or fire insurance of it, the plaintiff. The said rate order, if applied to this plaintiff, would be in effect to compel this plaintiff to alter and change its rates of charge upon fire insurance and the divers parts thereof, not upon the ground that it, the plaintiff, has made an unreasonable profit or any profit, or that it has suffered a loss upon any parts thereof, or such losses as endanger its solvency, or upon any other consideration affecting it, the plaintiff, but upon the sole ground that the supposed experience of other insurance companies alone considered is claimed and asserted to give warrant thereto.

Plaintiff further avers that the schedule of rates as so made, if applied by plaintiff as in said rate order directed, would be unfair and discriminatory as to persons insured, discriminatory and noncompensatory as to plaintiff and does not in anywise correspond to, or measure, or have any just or adequate relation to the value of the service and indemnity or the cost thereof to plaintiff, or the value thereof to the insuring public or the cost considering experience of well-organized and well-managed fire insurance companies, or the experience and cost to plaintiff.

The total income and outgo of this plaintiff upon its business of fire insurance in Kansas, during the years 1912 to 1921, inclusive, were as follows:

Income: (earned premium)	$231,201
Outgo: (incurred losses and expenses)	253,404
Loss	22,203

Said statute aforesaid as so construed and applied in directing the plaintiff to so alter its rates, upon the basis or ground that other stock fire insurance companies, competitors of plaintiff, have made or are making an unreasonable profit upon their business of fire insurance, or some parts or parcels thereof, and that plaintiff has income from sources other than its business of insurance in Kansas,

confiscates and takes property of the plaintiff without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States, and section 1 of the bill of rights of the constitution of Kansas.

Par. 12. Section 3 of chapter 152, Laws of 1909, of the state of Kansas, also appearing as revised statutes of Kansas, 1923, section 40-463, also appearing in insurance code of Kansas 1927 as section 40-913, is the sole and only statute purporting to or claimed to authorize the said defendant to make his said rate order. Said statute as so written and as so construed by the supreme court of Kansas and the attempted application thereof by the said rate order and demands of defendant superintendent that plaintiff apply same, and each of them, is unreasonable, confiscatory, unconstitutional and void as against this plaintiff for these reasons:

(*a*) Said statute authorizes the defendant superintendent to, and he did, make his said rate order regardless of whether the plaintiff's experience in Kansas upon its business of fire insurance or upon all its business or upon the classes by him in said rate order mentioned have shown or are showing a profit or a loss, but solely upon consideration of the experience of all stock fire insurance companies for a period next preceding the investigation by defendant, superintendent (commissioner) of insurance, which said experience upon the classes therein mentioned, the plaintiff says, were considered for period of three years only, which the plaintiff says was an entirely inadequate and unreasonable period to correctly or truly show true averages or just experience, and so the power to alter and dislocate the rates charged by the plaintiff and reduce them is made dependent, not upon experience for an adequate period of time nor upon any consideration of the experience of the plaintiff, but upon experience of other companies, competitors of plaintiff, in which plaintiff has no interest and over which it has no control, and considera-

tion of said matters for an entirely inadequate period of time. Said statute in so providing and empowering the commissioner, and the acts of the commissioner pursuant thereto, and each of them, confiscates and deprives this plaintiff of its property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and section 1 of the bill of rights of the constitution of Kansas.

(*b*) The business of fire insurance is purely and exclusively a private business and may be transacted by private persons in their individual capacity or by unincorporated or incorporated companies. The amount of the indemnity and the premium charge are matters of private negotiation and agreement. The business of insurance is a natural right, is voluntarily entered into and cannot be compelled. The business of the plaintiff in its business of fire insurance is not a public business, is not affected with a public interest or so affected, or to such an extent, as to empower the state of Kansas to prescribe and regulate the rates of premium charge of the plaintiff by their said classes. There is no constitutional power in the state of Kansas to so fix the rates and charges for service rendered by plaintiff, and the exercise of such power is the taking of private property for public use and deprives plaintiff of its property without due process of law and denies to it the equal protection of the laws in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of Kansas.

(*c*) Said statute as so construed and applied delegates to the commissioner of insurance the exercise of legislative power and the administration of legislative power, but wholly fails to provide any standard, rule or guide by which such power shall be exercised by him and leaves the same to the untrammeled whim and caprice of

the superintendent (commissioner) of insurance, in violation of section 1 of article II of the constitution of Kansas.

(*d*) Said statute, as construed and applied as aforesaid, provides that the ascertainment of aggregate profit of insurance companies and alteration and reduction of rates predicated thereon as applicable to experience of stock fire insurance companies, inclusive of plaintiff, to be applied to the plaintiff, shall be based upon and said rate order was based upon the amount of premiums written (received) by said stock companies in the aggregate, less losses and expenses by them paid, instead of being based upon the amount of premiums earned, less losses and expenses incurred. The profit or loss of an insurance company or insurance companies during any given period cannot be ascertained except by taking into account earned premiums of the period under calculation as income, and incurred losses and expenses as outgo. As applied to the term of time taken as a standard for computation by defendant, commissioner of insurance, he took into account, and was by the statute as construed by the courts of Kansas empowered to take into account, a large amount of premiums written (received) but not earned, namely, in the sum of $4,000,000, and treated as accrued income a large amount of incurred but unpaid losses and expenses which he rejected as outgo, in a large sum, to wit, $1,000,000. Said statute as so construed, if applied to plaintiff, thereby prescribes a method of calculation of profit and loss and undertakes thereby to justify a reduction of the income of plaintiff and to upset the sound balance and equality of hazard theretofore created, and such method so warranted by said statute as so construed and applied, is unreasonable, arbitrary, capricious, oppressive, fundamentally erroneous and confiscatory, and applied to the plaintiff takes its property without due process of law, in violation of section 1 of the fourteenth amendment

of the constitution of the United States and of section 1 of the bill of rights of the constitution of the state of Kansas.

(*e*) Said statute, as construed and applied as aforesaid, gives warrant to the commissioner of insurance, and he did, in the ascertainment of aggregate profit, take into account as income interest derived from investment of assets, namely, interest from invested capital, surplus and reserves for the period or term taken as a test in the making of said rate order. Plaintiff says that the said income so taken into account was income of its competitors, many millions of dollars in amount, many of which said competitors had income in much greater sum than had the plaintiff, and plaintiff had not nor has it such earnings in any amount in the state of Kansas, or in anywise arising from the operation of its business there, but the said supposed earnings of the plaintiff so warranted by statute to be taken into account were earnings derived beyond the boundaries of the state of Kansas, were from the investment of assets of stockholders independent of and in no wise a part of its operations of insurance in the state of Kansas and the sum so unconstitutionally taken into account was a sum in excess of two million dollars. And plaintiff says that the said statute as so construed and as so applied, and if the same be applied to and enforced against the plaintiff, adopts a method of calculation of supposed profit or loss and justifies reduction of its rates upon a basis which is unreasonable, oppressive, fundamentally erroneous and confiscatory. Said statute and the construction and application thereof purporting to authorize the rate order upon such considerations, as applied to the plaintiff, takes the property of the plaintiff without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of the state of Kansas.

And plaintiff says that thereby a reduction of the income of the

plaintiff is justified and its method and manner of doing business and its just and nondiscriminatory rates are thereby reduced, altered and rendered discriminatory, and unjust and inadequate to meet outgo, not because of any discrimination, impropriety, illegality or excessiveness of rates of the plaintiff and not because income of the plaintiff from its business in Kansas or even by inclusion of income from its investments would warrant such a rate order, but because other companies, competitors of plaintiff, in whose business the plaintiff has no interest and over which it has no control, are asserted to have had in effect discriminatory or excessive rates, or have had interest earnings from their investments or some part thereof supposedly warranting such rate order. Plaintiff says that the said statute as so construed and as so applied and as so authorizing said rate order, confiscates the property of the plaintiff and deprives the plaintiff of its property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of the state of Kansas.

(*f*) Said statute as construed and applied, and in affixing and making and designating the respective supposed classes in the said rate order recited, are classes so small and with such few risks embraced therein, and considered upon so short a period of time, namely, upon a three-year experience, and said order was based exclusively upon statistics of loss experience and by adoption of vocational name groupings, styled classes, and assigning to each of such classes an arbitrary amount as income purporting to be derived from investment of assets as aforesaid, in all of which said respects the same so by said statute justified and empowering the superintendent, is arbitrary, capricious, unreasonable and confiscatory. And plaintiff avers that a determination of probability upon which a rate change may justly and soundly rest cannot justly or reasonably

be made upon a predicate of a period of time so short as that by the commissioner of insurance employed, and states that in divers of such classes the amounts of the premiums and the losses even over long periods of time are so trivial and insignificant as to furnish no basis whatever for segregated experience thereon by consideration of the same within the boundaries of the state of Kansas, and that in none of such groupings are or were there risks sufficient in quantity or extending over a period of time adequate, or losses over a period of time sufficiently long, upon which to base any conclusions except arbitrary conclusions, and the plaintiff states that a minimum experience period proper for consideration in any case is five years, and that even that period is inadequate when applied to such risks within the state of Kansas, and that a reasonable period for consideration of the same upon all the business of fire insurance in the state would be ten years. And plaintiff further avers that such periods of time, even that of ten years, is entirely inadequate in spread considering the number of risks involved as respects the minute classifications in the rate order made. And plaintiff further states that in determining the propriety of rate charges and in affixing the same, the same is by uniform practice of insurance companies and skilled raters affixed upon a consideration of hazards inhering in risks potentially existing, so that a higher charge is made upon inflammable structures, such as wooden buildings, than is made upon less inflammable structures, such as brick buildings, even if statistical loss experience of a period of time discloses greater loss experience upon the less inflammable structures; that said considerations whereby potential hazards inhering in property and in its location and its exposure, construction and protection, form the predicate for affixing rate charges, cannot be justly applied by consideration alone or independently of loss experience which was the basis by the defendant commissioner applied and justified by such statutes. And

plaintiff says that the groupings by vocational names as in said rate order made are productive of inequality and arbitrary rate charges and that the effect of application of said statute as in said order on many classes is, in application thereof, to produce increases in fact where decreases are ordered, and decreases in fact where increases are ordered, and the same is productive of a complete dislocation and destruction of the entire rate structure built up by contribution of insurance companies inclusive of the plaintiff, which has been built up at a great cost with the express approval of the state of Kansas and its commissioner of insurance. And the plaintiff states that such vocational name groupings are in no wise definitive of the hazards involved, but to the contrary incorporate into such groupings entirely variant hazards and produce difference in charges upon identical hazards whereby gross favoritism and disparity of rate charge is produced. And plaintiff further avers that in practical operation, such powers created and delegated by said statute as applied by rate order, if put into force, would result in still greater inequalities and disruption of business of plaintiff, and particularly in this: that by analysis of hazard inhering in insured property rate charges have by the plaintiff and all other stock fire insurance companies for many years past been applied by determination of hazards inhering in such property, in which the controlling elements for the fixing of rate charges have been and are dependent upon consideration of the elements of (1) structure, (2) exposure, (3) inflammability and damagability of the contents and (4) protection, public and private, against fire loss; upon such considerations equality of rate charge is created and maintained. By such process, in formulation and application of which the plaintiff has spent large sums of money, and which stock companies have in the state of Kansas expended hundreds of thousands of dollars with the explicit approval of the state of Kansas and its Insurance Department, an equality of charge

respecting such several ingredients of hazard have been created and established as between different properties, even though differing in their physical kind, and as between public and private buildings, and thereby a body of fair and reasonably compensatory rates has been built up and were applied and charged before the making of said rate order. And plaintiff states that by the general terms of said rate order as the same reads and exists, and is justified by said statutes, if the same were possible and capable of application, the effect thereof would be to reduce the rate charges of the plaintiff upon fire insurance to the extent of more than five per cent and to that extent reduce rates below a reasonable, just and nonconfiscatory rate charge for the hazards and risks assumed. Plaintiff says, however, that in addition, the said statute justifying the said rate order, if undertaken to be applied to plaintiff, would be further destructive of income and compensation to the plaintiff and would cause it great additional loss, in that the same disturbs the relation between the parts of the body of its fire insurance rates and directs the plaintiff, in addition to making specified reductions of rates, to also make certain increases of rates, and plaintiff states that such increases are impractical of application and this plaintiff has to the present time declined and refused to place the same in force and effect and cannot place the same into force and effect without thereby suffering a greatly increased loss, and plaintiff states that such considerations arise in part out of the fact that in the case of crop insurance and certain of the increases upon automobile insurance ordered, the same are in no way within the power of the commissioner under the said statute as by the courts of Kansas construed, and as to those matters as respects fire insurance, respecting which he has ordered an increase, the same are in great part highly competitive in their nature, in that the plaintiff has competition from mutual insurance companies and reciprocal insurers who do a large

amount of business in the state of Kansas and who compete with the plaintiff more particularly in such classes in which increases are ordered, in consequence whereof if the plaintiff should undertake to and should put such increases into force and effect, its business in such classes, whereof it has in the past had a substantial amount, would in many of such classes be entirely lost to the plaintiff and in others would be in great part lost so that the plaintiff says that such supposed increases would not produce additional income to the plaintiff, but if sought to be effected would greatly reduce its income. More specifically, plaintiff states that in the case of sprinklered risks, the same are in sharper competition with other classes of insurers than is true of any other class of business, which said competition exists with such other class of insurers above mentioned; that in the case of railway risks the same are almost universally interstate and insurance is written covering the line of railways, whereby the insured seeks to and secures insurance respecting its entire line, assigning a part thereof ratably to the state of Kansas, and said risks written by master policies with subsidiary policies in the several states, and that where said railroads run through various states having regulatory laws, which is the case as respects states adjoining the state of Kansas, if too great a part be exacted as applicable to Kansas by virtue of increase as by said rate order provided, the result thereof is that the cost of the whole insurance upon the line would be so far in excess of the hazard and risk involved that said railways would cease to carry insurance upon their properties in Kansas and are well able to and would in such case carry their own risk; that as to public buildings, in general, the owners thereof are in position because of distribution of risk more largely than private owners, to carry their own risk if they see fit so to do, and that charges of premium disproportionate to hazard as is the case in said rate order would cause them so to do. Plain-

tiff states that the increases in said rate order are as destructive and injurious to the business of the plaintiff and if enforced would be productive of a loss and confiscation to an extent as great as are the several reductions by said rate order provided.

Plaintiff further says that so arbitrary and lacking in any just basis whatever is the said order that, purporting to act upon the experience of plaintiff and other insurers in the state of Kansas, the said order directs a reduction in rates based upon Kansas experience as respects breweries, distilleries, rectifying works and malt houses, although no such structures exist or have existed in the state of Kansas more than twenty years past, nor could same lawfully be erected.

Plaintiff further states that were changes to be made in the classes provided in said rate order, which the plaintiff states are entirely arbitrary, unsound and illogical classifications, that the basis adopted by the commissioner of predicating the same upon an experience for three years in the state of Kansas is completely unsound, in that in many of said classes there are only a nominal number of risks in the state and in many of said classes as few as five or six risks in the state comprised in such supposed classes. And the plaintiff states that in affixing rates of charge upon such hazards the plaintiff and the rating bureau affixing its charges upon such hazards has so done upon consideration and analysis of the physical fire hazards inhering therein and taken into account any inherent hazards shown by experiment in laboratories, by consideration of such hazards nation-wide, by judgment of engineers and others expert in weighing and analyzing hazards therein existing, and that to readjust and alter the charges thereon predicted upon such an adequate and arbitrary method and plan as by the defendant commissioner adopted, and by said statutes justified, is to destroy all relation between the charge of premium for such in-

surance and the hazard in such insured property existing and to destroy all equality of charge and subject the plaintiff to constant risk of prosecution and charge of discrimination and unfairness of rate charge, and make worthless and of no account its rating machinery which it has so built up at great expense as aforesaid.

And plaintiff says that in the securing and keeping of the business which it has built up at great expense and retaining the good will which it has as respects its policyholders in the state of Kansas, that the creation of gross inequalities, discriminations and unfair rate charges, measured one against the other, will be productive of such criticism, dissatisfaction and complaint by its customers and prospective customers that great amounts of business which otherwise would flow and come to the plaintiff will be diverted to mutual insurance compaines and reciprocal insurers and large numbers of persons will reduce the amount of insurance they otherwise would purchase or will carry their own risk, all of which will produce great loss to the plaintiff. Wherefore the plaintiff says that the said statute, as so construed and applied, confiscates the property of plaintiff and deprives plaintiff of its property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of Kansas.

(*g*) Said statute as so construed and applied makes no provision for notice to the plaintiff respecting any application to it of the said rate changes and the plaintiff says that although it, the plaintiff, had notice of proposed hearing before the said commissioner, respecting the aggregate result of experience of all companies in the state of Kansas and inquiry and hearing into their conglomerate or aggregate experience, plaintiff had no notice of the proposal or intent of the said commissioner to make rate readjustment by the said classes, as by him made, nor opportunity to protest or object

thereto, nor any notice nor opportunity to be heard as respects application thereof to the plaintiff, nor was there any consideration or opportunity for the consideration of the propriety or impropriety, justice or injustice, confiscatory or nonconfiscatory effect of such order, as applied to and considered in the light of any experience of the plaintiff, which said order so made without notice or hearing or opportunity has been justified by the supreme court of Kansas under said statute; wherefore the plaintiff says that said statute as so construed and applied deprives plaintiff of its property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of Kansas.

And plaintiff further avers that the said rate order of January 20, 1922, aforesaid, invades the constitutional rights of the plaintiff and deprives it of its property without due process of law, and that each and every of the considerations and reasons above set forth as reasons and grounds for invalidity of the said statute of Kansas aforesaid are here asserted as like grounds for invalidating the said rate order, upon all of which grounds the plaintiff says the said rate order deprives it, the plaintiff, of its liberty and property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of Kansas.

Plaintiff further avers that it, the plaintiff, is a well-established and well-organized fire insurance company with assets adequate to discharge and meet its liabilities; that it is well organized and economically and soundly conducted and that throughout the period it has been engaged in business in the state of Kansas it has conducted its business soundly, prudently and economically.

Plaintiff further alleges that on its business of fire insurance a reasonable method of affixing charges for its policies is by analysis

of the hazards inhering in property insured and making a charge therefor reasonably compensatory, which compensation cannot be gauged or judged as to any particular policy as respects the experience of such particular property, but in the light of the hazards and experience of fire loss and damage to similar properties considered over large areas and over long periods of time, and such process to affix charges thereto designed to produce upon the average or rate charges upon such insurance which will reimburse losses incurred thereon and expenses reasonably and properly incurred in the conduct of such business of insurance and a reasonable margin to meet the hazards of conflagration and for profit for undertaking and furnishing indemnity, and such reasonable standards, the plaintiff says, has been and by consensus of opinion is considered to be and the plaintiff says that it is five per cent of the earned premium charge upon the earned and incurred basis aforesaid in addition to three per cent for conflagrations. And the plaintiff says that the rates existing prior to the making of the rate order of the defendant, commissioner of insurance, in this bill set forth, were predicated upon sound and reasonable basis and that application thereof over many years of time had produced a margin much smaller than the said reasonable margin so to be anticipated upon making application thereof; that in truth and in fact less than a reasonable compensation has been and is being derived by the plaintiff for the hazards by it asumed upon the business of fire insurance, and at and prior to the time of the making of said rate order plaintiff did derive less than reasonable compensation for the conduct of its said business, which deficient and inadequate income would be still further reduced were said rate order to be applied to it and its business.

FOURTH.

Par. 1. Unless this court grants the relief herein prayed for, and if said reduction order aforesaid should be enforced, the plaintiff will sustain irreparable injury and damage in that the plaintiff will be compelled either to issue policies of insurance and conduct its business in Kansas at a financial loss and suffer disorganization and destruction of its established business, or plaintiff will be compelled to cease doing business in the state of Kansas entirely, and thereby lose its agency contracts, agency plants, established business, maps, surveys, rating records and good will, which are of great pecuniary value. If the order of the defendant, commissioner of insurance, should be enforced and applied to it, the plaintiff, and the plaintiff should refuse to comply therewith, the said defendant, commisioner of insurance, will proceed to revoke the licenses of plaintiff and its agents to do business in the state of Kansas, and defendants will institute and prosecute criminal actions against the plaintiff and its many agents in Kansas, and plaintiff and its said agents will thus be subjected to numerous prosecutions to recover many thousands of dollars in fines and penalties.

The actual loss to the plaintiff, if the said rate order aforesaid be enforced against it, and the diminution of the income of the plaintiff for each day, which it will suffer upon continuance of its business in Kansas, if said rate order be not enjoined, will occur from day to day and amount to a large sum of money each day plaintiff would be required to write its insurance at the rates in such rate order prescribed.

Par. 2. The defendants have threatened and unless restrained and enjoined by this court will take unlawful and unconstitutional action against and interfere with the business of the plaintiff in the following particulars:

Each defendant has asserted and if not enjoined will assert and publish to the insuring public of Kansas that the premium charges at the rate at which plaintiff has been exacting the same, and which it proposes to exact upon its contracts of fire insurance; namely, the rates existing prior to the entry of the said rate order aforesaid, are unlawful, and that the public need not pay or contract to pay the same to the plaintiff; whereby many persons will be induced to refuse and to decline to take insurance with the plaintiff and to pay premium charges to the plaintiff which it may and would demand and exact upon its insurances on properties in said state, and unless the defendants be enjoined they will bring, or cause to be brought, proceedings to enjoin or interfere with the collection by the plaintiff of such premium charges and will cause actions and proceedings to be brought against the plaintiff and against its officers, directors, employees and agents, in which said proceedings enormous and excessive fines and penalties prescribed by the laws of Kansas for violation of the said laws of said state would be imposed, and each issuance of a policy by or on behalf of plaintiff would be treated as a separate violation of law, and each exaction of premium treated as a separate and distinct offense, and will bring or cause to be brought actions to impose fines and penalties against representatives of the plaintiff before mentioned, and will bring or institute proceedings to revoke and cancel licenses of the plaintiff and its agents, of whom there are many in Kansas, and will, unless restrained, refuse renewal of the license of the plaintiff in this state and of its agents, upon the sole ground of failure to conform to such void rate order so made under said void statute aforesaid, and divers persons would commence and institute actions through and in the name of said defendants, and would subject the plaintiff to great and irreparable loss and damage and subject plaintiff, its officers, employees and agents to a multiplicity of suits, and divers

proceedings would be brought by policyholders and others against the impounded funds of the plaintiff, and upon the bond by it given as aforesaid, and would bring such actions in the name of the defendants, and said actions of the defendants would each be a trespass by the defendants under a void rate order and under a void and unconstitutional law, and the defendants do not have sufficient financial responsibility to answer adequately in the damages that would be sustained by the plaintiff; and it would be wholly impossible to adequately and legally measure the amount and extent of such damages; and such conduct and actions would deprive the plaintiff of its property and its liberty of contract without due process of law, and deny to it, the plaintiff, the equal protection of the laws.

Plaintiff has no plain, adequate or complete remedy at law and no relief can be afforded to the plaintiff from the operation and effect of such arbitrary, confiscatory and unconstitutional actions of the defendants against the plaintiff and its property, save only in a federal court of equity, and unless such relief is granted the property of the plaintiff will be confiscated and the plaintiff will suffer irreparable loss and injury.

Immediate and irreparable injury, loss and damage will result to plaintiff unless a temporary restraining order is granted without notice and an interlocutory injunction is granted, in this: That if the plaintiff should comply and conform with the said order of the defendant, commissioner of insurance, and write its insurance at the rates of premium by him ordered and directed, and it is subsequently held by this court that such demands, orders and requests are confiscatory or that said statutes or said order are illegal and unconstitutional and that the operation of said statutes or the operation of said rate order are unconstitutionally applied to the plaintiff, it will be impossible for the plaintiff ever to recover or

collect from the persons taking insurance with it, the plaintiff, the premiums representing the difference between the rates of premiums so collected and the rates of premiums which the plaintiff is legally entitled to charge and receive as aforesaid, which in many cases are small but are large in the aggregate, and the cost and expense of undertaking collection thereof would in many cases exceed the amounts therein respectively involved and the difference between the lawful rates as the same exist without application of said rate order and the said rates with said rate order applied thereto, when applied to the business by the plaintiff conducted from day to day in the state of Kansas, would amount to not less than $10 each day and will be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be granted by this court without notice to the defendants because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had, in this:

If defendants receive advance notice of plaintiff's application for a temporary restraining order the defendants will, before the hearing thereof, have it within their power and they will proceed in divers ways to enforce the said order and the execution thereof as against the plaintiff, and will institute a multiplicity of suits against the plaintiff, and will proceed to revoke the licenses of plaintiff, its agents and representatives to do business in Kansas, and cause or permit proceedings to be instituted in their name or names upon the bond above recited, against plaintiff and its surety thereon, and will so proceed because of a supposed violation of said statutes and non-compliance with the said rate reduction order.

Wherefore, The premises considered, plaintiff prays:

1. That the said William R. Baker, commissioner of insurance of the state of Kansas, and the said William A. Smith, attorney-general

of the state of Kansas, who are made parties hereto, be summoned to appear and to be required to make full and direct answer to this bill, but not under oath, answer under oath being hereby waived.

2. That it be *ordered, adjudged and decreed:*

(*a*) That statute of the state of Kansas appearing as Laws 1909, chapter 152, section 3; also appearing as section 40-463, Revised Statutes of Kansas, 1923; also appearing in insurance code of the state of Kansas, chapter 231, Laws of 1927, and there appearing as section 40-913, and also section 9, chapter 152, of the Laws of 1909 of the state of Kansas, which section is also styled section 40-469, Revised Statutes of Kansas, 1923, which said section is also styled in the insurance code of Kansas, chapter 231, Laws of 1927, as section 40-919, are and each of said statutes is unconstitutional and void, contrary to and in violation of section 1 of the fourteenth amendment of the constitution of the United States and in violation of section 1 of the bill of rights of the constitution of the state of Kansas.

(*b*) That the rate order of the superintendent (commissioner) of insurance of the state of Kansas of date January 20, 1922, as respects fire insurance and fire insurance rates is, and each and every part thereof relating to rates of premium charge upon fire insurance is, as against the plaintiff, unreasonable, confiscatory, unconstitutional and void and operates to deprive the plaintiff of its liberty of contract and of its property, without due process of law, in violation of section 1 of the fourteenth amendment to the constitution of the United States and of section 1 of the bill of rights of the constitution of the state of Kansas.

(*c*) That the proposed action of the defendants and each of them, whereby they propose to subject the plaintiff, its directors, officers, agents, employees, or any of them, to actions for penalties or fines or revocation of licenses, are in violation of the rights of the plain-

tiff and deprive the plaintiff of its liberty of contract and of its property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of the state of Kansas.

3. That the court make a temporary restraining order without notice to the defendants, to be effective until the hearing upon plaintiff's application for interlocutory injunction and that upon such hearing an interlocutory injunction issue, and that by each of said orders, namely, the temporary restraining order and the order for interlocutory injunction, the defendants, William R. Baker, commissioner of insurance of the state of Kansas and William A. Smith, attorney-general of the state of Kansas, and each of them, their deputies, attorneys, solicitors, agents, servants and representatives, and all others acting or claiming or assuming to act for or under the authority of or in the name of said defendants or either of them, and all other persons who now or shall hereafter seek or attempt to enforce said rate order made by the superintendent (commissioner) of insurance of the state of Kansas, on January 20, 1922, be and they are hereby restrained and enjoined from taking any proceedings whatever under or pursuant to or for the enforcement of obligations arising under the said rate order and from enforcing or attempting to enforce or from advising, instituting, prosecuting or aiding in any action, suit or proceeding or otherwise to enforce said order or to enforce against or sue plaintiff or its surety as respects a certain bond of the plaintiff being a bond executed pursuant to said rate order with surety, or against any officer, agent or employee of the plaintiff, or against Kansas Inspection Bureau, an agency of the plaintiff, or from giving or enforcing any orders or directions to said Kansas Inspection Bureau in anywise calculated to enforce or make effective said order, which would in anywise affect the rates or the

premiums or charges of the plaintiff upon its business of fire insurance in the state of Kansas because of said rate order; that said defendants and others heretofore mentioned be and they are hereby enjoined from taking any steps or proceedings whatsoever under or pursuant to such order or from advising, instituting, prosecuting or aiding in any action, suit or proceeding of any kind or character under the laws of the state of Kansas or otherwise, in furtherance thereof, or pursuant to said statutes aforesaid, or from proceeding to recover from or to impose upon or enforce against the plaintiff or any of its officers, directors, United States manager, employees, attorneys in fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus, or any other person in anywise representing the plaintiff, any fine, penalty or demand for refusal to observe, obey or comply with said rate order or any of the terms, commands or requirements thereof relating to the business of the plaintiff in its business of fire insurance, or making any direction respecting application thereof, or from proceeding against the plaintiff, its agents, employees or sureties upon bonds, in anywise because of exaction of premiums by the plaintiff at a rate level unaffected by said rate order, or because of delivery of policies specifying such rates last named, or from interfering with or attempting to interfere with, or from advising, instituting, prosecuting or aiding or using the name of defendants, or either of them, in any action, suit or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employees from charging, receiving or collecting the rates of premium charged for insurance which would be lawful except for said rate order.

That the defendants be restrained and enjoined from in anywise proceeding under or taking any action whatsoever under or pursuant to or authorized by section 40-918, or section 40-919, or section 40-920, insurance code of the state of Kansas, 1927, or said sections as

amended, or any other action or proceeding prescribed or authorized by the law of Kansas for violations of provisions of the insurance laws of said state or to enforce, take or effectuate any action under section 40-913 or section 40-919 of insurance code of the state of Kansas, 1927, or pursue any rights thereunder because of any supposed violation of the said rate order or the statute purporting to authorize it as aforesaid.

That the defendants be restrained and enjoined from revoking the license of the plaintiff or any of its agents or representatives and from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding the same upon the ground of any such supposed violation by them or any of them of the said statutes or rate order above referred to.

That the defendant, commissioner of insurance of the state of Kansas be restrained and enjoined from disbursing, paying, transferring, relinquishing, delivering or otherwise permitting himself to become divested of the impounded monies with him deposited by the plaintiff, or any interest, increment or increase thereof in anywise in his possession or control or coming into his possession or control except as he may deliver or pay or surrender the same to the plaintiff.

And that upon a final hearing of this cause the said impounded monies may be declared and held to be the monies of the plaintiff, together with all increase, interest and increment thereon arising, and may upon final decree of this court be adjudged to be the property of the plaintiff, and the said defendant directed and ordered to deliver and pay the same to the plaintiff, and that the plaintiff may have a decree against the said defendant for delivery thereof to plaintiff.

That the interlocutory injunction above prayed for issue against defendants upon five days' notice to them and to the honorable

Ben S. Paulen, governor of Kansas, respectively, of the intended application therefor, and enjoining and restraining the defendants as above prayed, pending hearing of this cause, and until further order of this court, and that such hearing be had before three judges as is by statute prescribed in such cases; that a temporary restraining order may be issued as above prayed without notice, to be effective until the date to be set by the court and until hearing and determination of application for interlocutory injunction; that upon final hearing in this cause, which the plaintiff prays may also be had before three judges as provided by law, that said interlocutory injunction shall be made permanent and that the court grant to plaintiff such other and further relief as to the court may seem just and proper and to equity appertain, and that plaintiff recover of defendants its costs herein.

ROBERT J. FOLONIE,
ROBERT STONE,
JAMES A. MCCLURE,
Solicitors for Plaintiff.

By JAMES A. MCCLURE,
Solicitor.

State of Kansas, county of Shawnee, ss.

Carl Hodges, of lawful age, being first duly sworn, upon his oath says that he is agent for the plaintiff in the above-entitled cause in this behalf, and is authorized to and does make this affidavit on behalf of the plaintiff, and says that the statements contained in the foregoing bill are true. CARL HODGES.

Subscribed and sworn to before me this 28th day of March, 1928.

My commission expires September 23, 1929:

LOUISE ANDERSON,
Notary public within and for said county and state.

(Seal).

APPENDIX C.

Motion of Plaintiff for an Interlocutory Injunction Against the Defendants, and for the Court to Assemble a Court of Three Judges to Hear the Plaintiff's Application for an Interlocutory Injunction.

(Title of Case Omitted.)

Comes now the plaintiff in the above cause and hereby moves and applies to the court to constitute and assemble a court of three judges, as by law provided, and that, as promptly as may be, such court may consider this application of the plaintiff for an interlocutory injunction, and may grant a hearing; upon such hearing grant to the plaintiff an interlocutory injunction, as prayed for in the bill of complaint on file herein.

ROBERT J. FOLONIE,
ROBERT STONE,
JAMES A. MCCLURE,
Solicitors for Plaintiff.

APRIL 11, 1928.

APPENDIX D.

In the District Court of the United States

OR THE DISTRICT OF KANSAS, FIRST DIVISION.

RICULTURAL INSURANCE COMPANY, a Corporation,
aintiff,
vs.
LLIAM R. BAKER, Commissioner of Insurance of the State of ansas, and WILLIAM A. SMITH, Attorney-general of the ate of Kansas, *Defendants.*

No. 963-N.

SUPPLEMENTAL BILL.

omes now the plaintiff in the above-entitled action, leave of t having been obtained, and for its supplemental petition in cause respectfully represents to the court that:

I.

ne C. F. Hobbs was in November, 1928, elected commissioner of rance for the state of Kansas for a term of two years beginning uary 14, 1929. The term of office of William R. Baker, com- ioner of insurance, terminated on January 14, 1929, at which he was succeeded in office by Charles F. Hobbs, who then be- e and ever since that time has been the duly qualified and acting missioner of insurance of the state of Kansas.

II.

Charles F. Hobbs not only has succeeded to all of the rights, powers, duties, and privileges of said defendant, William R. Baker, but has in all respects adopted the acts and policies of said William R. Baker as such commissioner in all things complained of in the bill of equity heretofore filed herein.

III.

The orders and matters complained of in the original petition were departmental in character.

IV.

Plaintiff renews each and all of the allegations and averments made in its bill of equity heretofore filed, and alleges that they are each and all applicable to the said Charles F. Hobbs as commissioner of insurance for the state of Kansas, to the same extent and in the same respect that they were applicable to said William R. Baker as such commissioner.

Wherefore, The premises considered, the plaintiff prays that:

1. The Said Charles F. Hobbs, commissioner of insurance for the state of Kansas, be substituted as a party defendant herein in lieu of William R. Baker as such commissioner, and that he be summoned to appear and be required to make full and direct answer to the bill, but not under oath, answer under oath being hereby waived.

2. The allegations and prayer of said original bill be considered in all other respects applicable to the said Charles F. Hobbs, commissioner of insurance of the state of Kansas, as substituted for William R. Baker, commissioner of insurance of the state of Kansas; that said cause proceed against him as such substituted party.

R. J. FOLONIE,
ROBERT STONE,
Attorneys for Plaintiff.

APPENDIX E.

In the District Court of the United States

FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

AGRICULTURAL INSURANCE COMPANY, a Corporation, *Plaintiff*,

vs.

CHARLES F. HOBBS (substituted for WILLIAM R. BAKER), Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the state of Kansas, *Defendants*.

Case No. 963-N

ANSWER OF DEFENDANT CHARLES F. HOBBS, AND AMENDED ANSWER OF DEFENDANT WILLIAM A. SMITH.

Come now Charles F. Hobbs, commissioner of insurance of the state of Kansas, and William A. Smith, attorney-general of the state of Kansas, defendants in the above-entitled cause, and said Charles F. Hobbs, for his answer, and said William A. Smith, for his amended answer, to the bill in equity filed by the plaintiff in said cause, and for their answer to the supplemental bill, state:

FIRST.

Defendants admit that at all the times mentioned in the bill in equity the plaintiff was a corporation of a state other than the state of Kansas and was organized and existing under the laws of the state of New York as a stock fire insurance company, and that it had been engaged in the business of insurance in the state of Kansas by

license issued to it from year to year on behalf of the state of Kansas for more than fifteen years last past, and is authorized by its charter to do a business of fire, lightning, hail, windstorm and allied lines of insurance usually done by fire insurance companies, and that the plaintiff is a resident of the state of New York, but deny that the plaintiff is a citizen of New York. Defendants admit that the defendant, William R. Baker, is now and for some time has been a citizen and resident in Shawnee county of the state of Kansas and of the district of Kansas, and admit that said defendant from the second Monday of January, 1923, until the end of May 1927, was the duly elected, qualified and acting superintendent of insurance of the state of Kansas, and that since that time, from including June 1, 1927, to the second Monday of January, that is, January 14, 1929, he was the duly elected, qualified and acting commissioner of insurance of the state of Kansas. Defendants deny that the said William R. Baker was the superintendent or commissioner of insurance of the state of Kansas prior to the second Monday of January, 1923, but state that for some time next prior to the last named date Frank L. Travis was the superintendent of insurance of the state of Kansas. Defendants state that the defendant, Charles F. Hobbs, is now and has been the commissioner of insurance of the state of Kansas ever since January 14, 1929.

Defendants admit that the defendant, William A. Smith, is the attorney-general of the state of Kansas, and as such attorney-general is the chief law-enforcing officer of said state, subject in certain particulars to the control and direction of the governor of the state, having supervision in certain particulars of the enforcement of the laws on behalf of the state against any person or corporation who may be claimed to have violated the law, and subject to certain qualifications and limitations generally to enforce the law on behalf of said commonwealth. Said William A. Smith is a

resident and a citizen of the state of Kansas and of the district of Kansas aforesaid. Defendants deny that he is a resident of Shawnee county, but state that he is a resident of Jefferson county, Kansas.

SECOND.

Defendants deny that this is a suit of a civil nature in equity, that the matter in controversy is of the value of $5,000 and exceeds, exclusive of interest and cost, the sum or value of $3,000.

(1) Defendants admit that since the making of the rate order in question of January 20, 1922, by the superintendent of insurance, the style of such office has been changed and the officer who fills it is now styled the commissioner of insurance. Defendants state that such change of style was made by chapter 231, Laws of Kansas, 1927, entitled the "Insurance Code," which took effect June 1, 1927. Defendants deny that this suit arises under the constitution of the United States and deny that the order of the superitendent of insurance complained of is violative of the first section of the fourteenth amendment of the constitution of the United States, and deny that said order denies to plaintiff the equal protection of the laws, and deny that said order deprives the plaintiff of its property and liberty without due process of law.

(2) Defendants deny that this suit arises under the constitution of the United States and that the plaintiff is deprived of property without due process of law by section 3, chapter 152, Laws of Kansas, 1909, which is section 40-463, Revised Statutes of Kansas, 1923, or by the amendment to that section by section 40-913 of chapter 231, Laws of Kansas, 1927, known as the "Insurance Code." Defendants deny that the plaintiff is deprived of property without due process of law by section 9, chapter 152, Laws of Kansas, 1909, which is section 40-469, Revised Statutes of Kansas, 1923, and which as amended is section 40-919 of said Insurance Code, Laws of Kansas, 1927. Defendants admit and state that said statute

first above mentioned is the statute, in connection with other provisions of the statute, by virtue of which the authority of the superintendent of insurance of Kansas to make the said order complained of is asserted, and that said other statute secondly above mentioned is the statute, in connection with other provisions of the statute, by virtue of which power prior and subsequent to the making of said rate order has been and is asserted and claimed. Defendants deny that said statutes and either of them alone or in connection with other statutes, as the same are construed and applied, deprive the plaintiff of its property without due process of law. Defendants admit and state that they rely upon said statutes and other statutes in connection with them in their claims of power. Defendants deny that they claim any violation of said statutes by the plaintiff so far as the enforcement of said rate order has been delayed by litigation in the state courts of Kansas hereinafter referred to, and deny that they have threatened to proceed against the plaintiff if not enjoined, and deny that they will proceed to enforce said rate order against the plaintiff while the enforcement of said rate order is prevented by orders of the courts of Kansas hereinafter referred to, but admit that upon the conclusion of such litigation in the courts of Kansas, when they will be at liberty to do so under the judgments of said courts, then they will proceed to enforce said rate order to the extent that the judgments of said courts of Kansas permit, but no further. Defendants deny that each of said statutes in connection with any other statutes of the state of Kansas is and are in violation of the first section of the fourteenth amendment of the constitution of the United States in that (*a*) they deny the plaintiff the equal protection of law or (*b*) that they deprive plaintiff of its property or liberty without due process of law.

(3) Defendants deny that this suit is between citizens of different states, but admit that it is between the plaintiff, a corporation of the

state of New York, and the defendants, who are citizens of the state of Kansas, and deny that the plaintiff is a citizen of New York.

THIRD.

(1) Defendants admit that the plaintiff is now, and at all times mentioned in the bill in equity was, a fire insurance company engaged in the business of fire, lightning, hail and windstorm insurance, and authorized and licensed to do and doing said business in the state of Kansas.

Defendants admit that in order to conduct its business in the state of Kansas the plaintiff has been obliged to establish and did establish, long before January 20, 1922, local agencies in various cities and towns throughout the state, but deny that such establishment was at large cost and expense, and deny that said agencies so established are of great value. Defendants admit that without such agencies it would be impossible for the plaintiff to conduct its business of insurance in the state of Kansas, and deny that said established agency plants are of great value to the plaintiff, and deny that they are of a value of $5,000.

Defendants deny that the plaintiff has made surveys and from such surveys has compiled maps, which are supplied to its agents in Kansas and are by them used in the writing of insurance in the state of Kansas, and deny that said surveys and maps are elaborate or have been made at great cost and expense, and deny that said maps and surveys are of a reasonable value in excess of the sum of $1,000.

Defendants deny that long before January 20, 1922, the plaintiff had compiled, and does now maintain in the state of Kansas, a public rating record through the medium of the Kansas Inspection Bureau, including extensive maps, surveys and other data comprehending the result of inspection of many thousands of parcels of insurable property in said state, from which the rate of premium applicable to each risk in this state may be ascertained in advance of the making of in-

surance thereon; and that such rating record includes general basis schedule, embodying basis rates, charges, terms, conditions, permits, and standards, and other data, and deny that the data contained thereupon are such as are necessary for the computation and promulgation of rates and rules of practice by the plaintiff. Defendants deny that such general basis schedules have complied with section 40-461, Revised Statutes of Kansas, 1923, and deny that they have embodied all charges, credits, terms, privileges and conditions, which in any wise affect such rates or the value of the insurance issued to the assured, and deny that such general basis schedules have shown the rates on all classes of risks insurable by the plaintiffs in Kansas, and deny that the matters and things contained in such general-basis schedules are those which are necessary for the computation and promulgation of equitable rates and rules of practice. Defendants deny that such records show the forms and indorsements upon which each rate is predicated, and show the changes of rate to be made on account of each and every change of form or indorsement. Defendants deny that such rating records of plaintiff are of the value of more than $3,000.

(2) Defendants admit the allegations contained in paragraph 2, section third, of the bill in equity, concerning section 3 of chapter 152 of the Laws of Kansas, 1909, published in the Revised Statutes of Kansas, 1923, as section 40-463, and that the word "superintendent" in said section was changed to read "commissioner" by the Insurance Code of Kansas, which took effect June 1, 1927, being chapter 231, Session Laws of Kansas, 1927.

Defendants admit the allegations contained in said paragraph and section of the bill in equity concerning section 9 of chapter 152 of the Laws of Kansas, 1909, and section 40-469 of the Revised Statutes of Kansas, 1923, excepting that the defendants state that said section was amended by section [illegible], chapter 231, Session Laws of Kan-

sas, 1927, said chapter being known as the insurance code of Kansas, 1927, and said section 40-919 took effect upon June 1, 1928. The amendments by said later section to the statute as it existed prior thereto in section 9 of chapter 152 of the Laws of 1909, and in section 40-469, Revised Statutes of Kansas, 1923, was to substitute the title "commissioner" instead of "superintendent," referring to the commissioner of insurance, and by some slight verbal changes, and by the addition of the following clause:

"Provided, That the court may in its discretion in lieu of such deposit require of such company a bond with such sureties and in such sum as the court may fix and approve, conditioned upon the payment by such company of all costs awarded or assessed against it upon final hearing, and the repayment by such company of such sum or sums of money to policyholders affected by such decision as may be directed by the court, which bond and the sureties thereon shall be approved by the court and filed as in other cases."

Said addition was inserted next before the sentence in section 40-469, Revised Statutes of 1923, which sentence began with the words, "Whenever any action shall be brought by any insurance company under the provisions of this section."

Defendants deny that by section 10 of chapter 152, Laws of Kansas, 1909, appearing in Revised Statutes of Kansas, 1923, as section 40-470, it is provided that in the event of any infraction of said statute, or doing or permitting to be done any act contravening the same, for each offense the offender shall be fined by a fine not exceeding $100. Defendants state that section 10 of chapter 152 of the Laws of Kansas, 1909, which appears as section 40-470, Revised Statutes of Kansas, 1923, provides as follows:

"That any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company, who alone, or with any other corporation, company or person, shall willfully do or cause to be done, or shall willfully suffer or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or who shall willfully omit or fail to do

any act, matter or thing in this act required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this act to be done, not to be done, or shall be guilty of any infraction of this act, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine not to exceed one hundred dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination, such person shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for a term, not exceeding ninety days, or by both such fine and imprisonment."

Defendants state that said section last above mentioned was amended by section 40-920, chapter 231, Laws of Kansas, 1927, which took effect upon June 1, 1927, and that said amendment consisted of the omission of the word "that" from the beginning of said section 40-470, Revised Statutes of Kansas, 1923, and by the substitution of the word "article" for the word "act" each time that said word "act" in the sense of referring to chapter 152, Laws of Kansas, 1909, or sections 40-461 to 40-474, inclusive, Revised Statutes of Kansas, 1923, appeared in said section 40-470.

Defendants deny that they will assert and claim that every issuance of a policy and every exaction of a premium if issued or exacted respectively, contrary to the directions of the insurance commissioner, as set forth in the bill in equity in the latter part of paragraph 2 of section third thereof, will subject the plaintiff and its agents and representatives to such penalties.

Defendants state that by section 1 of chapter 207, Laws of Kansas, 1917, it was among other things provided that "The superintendent of insurance upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate all fire insurance rates," and that such provision appears in section 40-472, Revised Statutes of Kansas, 1923. Defendants state that said provision was amended by section 40-922, chapter 231, Laws of Kansas, 1927,

by inserting the word "commissioner" instead of the word "superintendent," and which section 40-922 took effect upon June 1, 1927.

(3) Defendants admit that upon January 20, 1922, Frank L. Travis was superintendent of insurance of the state of Kansas, and admit and state that he was succeeded in such office by the defendant, William R. Baker, as superintendent of insurance, upon the second Monday in January, 1923, and that the title of such office has since that time been changed by law to that of insurance commissioner, and state that such change of title was made by chapter 231, Laws of Kansas, 1927, which took effect upon June 1, 1927, and admit that said officers bearing said different titles held identical offices and not different offices. Defendants admit and state that upon January 20, 1922, Frank L. Travis, then superintendent of insurance of the state of Kansas, acting under section 3 and section 9, chapter 152, Laws of Kansas, 1909, and of the other sections of said chapter, taken in connection with said section 3 and said section 9, and chapter 207, Laws of Kansas, 1917, and chapter 45, Laws of Kansas, 1920, promulgated an order in writing, which was by him directed to W. C. Hodges, attorney in fact for all fire insurance companies authorized to transact business in the state of Kansas, and subscribers to the Kansas Inspection Bureau of Topeka, Kansas; and admit and state that said order was made by him pursuant to a notice of August 10, 1921, of a hearing, addressed by him to W. C. Hodges, attorney in fact for said plaintiff, a copy of which notice is set out in paragraph 3, section third of the bill in equity, excepting that defendants state that said notice was added to and supplemented by three notices and letters which were delivered by said Frank L. Travis, superintendent of insurance of the state of Kansas, upon or about September 12, 19 and 28, respectively, 1921, to said W. C. Hodges, attorney in fact for said com-

panies. Copies of such letters and notices of September 12, 19 and 28, respectively, 1921, are set out as follows:

No. 25468. September 12, 1921.

Superintendent of Insurance.

W. C. Hodges, Attorney in Fact for Fire Insurance Companies authorized to do business in Kansas.

In re: Information for Hearing on Rates.

1. The following information is requested by this department for use in hearing October 17, 1921, and must be furnished on or before October 16, 1921:

Q. 1. The loss ratio in Kansas by classes covering a period of five years previous to January 1, 1921, segregating the different classes as outlined by Underwriters' Experience.

Q. 2. The loss ratio in other states of the Union whether same be rated under the Dean Schedule or not; segregating same as outlined in paragraph 1.

Q. 3. The above must cover all classes of fire, tornado and hail, including grain and miscellaneous risks. The above loss ratio must be figured according to premiums received as against losses paid.

Q. 4. Premiums received and losses paid in Kansas.

Q. 5. Premiums received and losses paid in all other states in the Union giving each state separately.

Q. 6. The basis and contents tables used in figuring rates on the different classes of buildings in all states where the Dean Schedule is used. This must also cover basis and contents tables for special hazard risks.

Q. 7. The basis and contents tables used on all different classes, including special hazards in all other states not covered by the Dean Schedule.

Q. 8. Expenses in Kansas; showing local agents' commissions, special and state agents' expenses, state and federal taxes, and portion of general office expenses apportioned to Kansas, and the expense of maintaining the Kansas Inspection Bureau, segregating each item.

Q. 9. The total revenue derived from interest on unearned premiums.

Q. 10. Segregate from all other classes the premiums received and losses paid on sprinklered risks in all states of the Union; showing the above amounts for each state separately.

Q. 11. The fire, tornado and hail rates on all classes of farm property, including live stock in all states in the Union, showing the loss ratio for each state and class separately.

Q. 12. The tenant occupancy charge on all farm property in all states of the Union.

Q. 13. The permiums received and losses paid on farm property occupied by tenants in all states.

Q. 14. The premiums received and losses paid on farm property occupied by the owner, in all states.

Q. 15. The loss ratio on farm property occupied by tenants as compared with the loss ratio on farm property as occupied by owner in all states; segregating same.

Q. 16. All of the above must cover a period of five years previous to January 1, 1921.

Q. 17. A copy of the co-insurance or the reduced rate contribution clause as in force at the present time in all states.

Q. 18. The *pro rata* distribution as in force in all states showing credits for the different amounts of insurance carried.

Q. 19. All other clauses, permits, indorsements, and/or riders in force in all states, showing charge, if any, for attachment of same.

Q. 20. The standardized term, rule and risks, entitled to same in force at the present time, covering in all states.

Q. 21. The use and occupancy schedule as used in all states.

Q. 22. A copy of the short-rate cancellation table as used in all states.

FRANK L. TRAVIS,
Superintendent of Insurance.

No. 26137. September 19, 1921.

Superintendent of Insurance.

W. C. Hodges, Manager Kansas Inspection Bureau, Topeka, Kan.

In re: Railway Subrogation Waiver, Mercantile Dwelling Occupancy.

1. This department has been requested by Mr. John L. Hunt, representing the fire insurance companies affected by the above order, that we extend the time for which the above orders become effective.

2. You are hereby notified that this department has withdrawn its orders of May second and September eighth, 1921, regarding the Railway Subrogation Waiver; also our order dated October August

26, 1921, referring to dwelling occupancy in mercantile risks; same to be taken up and discussed at the rate hearing October 17, 1921, at which time a definite decision will be rendered.

FRANK L. TRAVIS,
Superintendent of Insurance.

27080. September 28, 1921.

Superintendent of Insurance.

W. C. Hodges, Attorney in Fact for Fire Insurance Companies authorized to transact business in the State of Kansas.

In re: Information for Hearing on Rates.

1. The following information is requested by this department for use in the hearing October 17, 1921, and must be furnished on or before October 16, 1921.

Q. 1. The states in which the Standard Schedule for rating cities and towns of the United States with reference to fire defenses and physical conditions as issued by the National Board of Fire Underwriters, adopted December 4th, 1916, is used.

Q. 2. The states in which the Standard Schedule for rating cities and towns of the United States with reference to fire defenses and physical conditions as issued by the National Board of Fire Underwriters, adopted December 4, 1916, is *not* used.

Q. 3. A copy of all classification grading schedules used in all the states of the United States.

Q. 4. A copy of the classification grading schedule for grading special hazards in all the states of the United States.

FRANK L. TRAVIS,
Superintendent of Insurance.

Defendants admit that a copy of said order of Frank L. Travis, superintendent of insurance of the state of Kansas, made by him January 20, 1922, and delivered by him upon that date to W. C. Hodges, attorney in fact for the plaintiff and for all fire insurance companies authorized to transact business in the state of Kansas, and subscribers to the Kansas Inspection Bureau of Topeka, Kansas, and which order by the terms thereof was to have become effective March 1, 1922, is set out in paragraph 3 of section third of the bill in equity.

(4) Defendants admit that thereafter in February, 1922, purporting to act under section 9, chapter 152, Laws of Kansas, 1909, which afterwards appeared as section 40-469, Revised Statutes of Kansas, 1923, the stock fire insurance companies, 125 in number, comprising all of the stock fire insurance companies then doing business in Kansas, and including this plaintiff, filed a review proceeding or suit to review and attack said rate order. Defendants admit that said suit was brought by an action by said insurance companies against Frank L. Travis as superintendent of insurance, in the district court of Shawnee county, Kansas, and allege that William R. Baker, the successor in office of said Travis as such superintendent of insurance, was thereafter, in said court, substituted as defendant in said suit instead of said Frank L. Travis as such superintendent of insurance. Defendants admit the said case was considered on appeal by the supreme court of Kansas, in an action pending in said supreme court, and that said supreme court of Kansas sustained the portion of said order in controversy before it—that is, the portion of said order pertaining to fire insurance and incidental matters—and justified and upheld such portion of said order. Defendants deny that there was any joint cause of action in favor of plaintiffs and against the defendant, alleged by them upon their pleadings in said case, and allege that several and distinct, and not joint, causes of action were alleged by the plaintiffs on their pleadings in said case for each plaintiff as against the defendant. Defendants deny that in the said case in the district court and in the supreme court of Kansas there was any unconstitutional invasion of the rights of the plaintiff, as set forth in said bill in equity in paragraph 4 of section third thereof, and deny that any unconstitutional invasion of the rights of the plaintiff asserted and alleged by the plaintiff in paragraph 4 of section third of the bill in equity, were not, or could not be considered in said case in

said district court of Shawnee county, Kansas, and the supreme court of the state of Kansas.

(*a*) Defendants deny that the supreme court of Kansas in said case in that court held that the standard of measurement of aggregate profit of all stock fire insurance companies in the state of Kansas during the antecedent test period, whereby to limit their aggregate collections and restrict their aggregate earnings for the future upon their business of fire insurance, should be based upon the adoption of the amount of written premiums or premiums received as income, and losses and expenses paid considered as outgo; and defendants deny that such a basis for such a purpose was employed and adopted by the superintendent of insurance in making the rate order in question; and defendants deny that thereby said supreme court or said superintendent of insurance took into account as income unearned premiums covering prepayment for liability of the future extending beyond any test period and beyond the date of said rate order, and rejected as outgo losses and expenses incurred but not yet paid, whether or not liability for the same was firmly fixed during such test period.

Defendants allege that the supreme court, in said case before it, held that during the test periods presented to it by the record there should be taken into account the amount of written premiums or premiums received as income by the insurance companies, and that there should be taken into account losses and expenses paid, and that there should not be taken into account any losses or expenses which would not have to be paid, although the same might be called incurred losses or incurred expenses; and defendants allege that the superintendent of insurance in making his said rate order considered that there should be taken into account the amount of written premiums, or premiums received as income by the insurance companies, and that there should be taken into account losses and ex-

penses paid, and that there should not be taken into account losses or expenses which would no have to be paid, although the same might be called incurred losses or incurred expenses.

Defendants allege that the supreme court of Kansas held in said case that the method of computations and figures presented by the insurance companies did not allow a sufficient amount as income, and credited too large amounts for losses and expenses, and that the method of such computations and figures was erroneous and unsound, and that the insurance companies had failed to establish a case for relief.

Defendants deny that any test period was adopted by the supreme court of Kansas in said review proceedings; but state that the plaintiffs upon trial of said case in the district court of Shawnee county, Kansas, presented evidence upon three different ten-year periods beginning respectively with the year 1911, 1912 and 1913, and that the defendant in the trial of said case in said district court presented evidence for a test period of ten years, beginning with the year 1913, and with regard to classes for a period of five years, beginning with the year 1918, and that the evidence as to such test periods was before the supreme court of Kansas and considered by it.

(*b*) Defendants deny that any method of allocation, as distinguished from classification, of rates of premium income was justified by the supreme court of Kansas in said case.

Defendants allege that the method of classification of rates used by the superintendent of insurance in making his rate order was held in said case by the district court of Shawnee county, Kansas, to be valid, and that said holding was affirmed by the supreme court of Kansas.

Defendants admit that the supreme court of Kansas in said review proceeding held said rate order to be warranted as against such review proceeding, and deny that in said cause any assertion by the

plaintiff of any unconstitutional invasion of its rights was not, nor could not be considered or determined, and deny that in said rate order there was any unconstitutional invasion of the rights of the plaintiff.

(*c*) Defendants deny that the experience of all stock fire insurance companies doing business in the state of Kansas in the aggregate upon their business of fire insurance for the years 1912 to 1921, inclusive, being the period of ten years immediately prior to the said rate order, without said rate order being applied, was as follows:

Premiums earned not more than.....	$49,342,631
Losses incurred as much as.....	26,198,088
Expenses incurred as much as.....	21,540,435

And deny that the total of said last two items was as much as $47,738,523.

Defendants deny that the charge for conflagrations properly to be considered as outgo for said term is $1,598,575, and deny that any change should be made for conflagrations, and deny that the profit of all companies in the aggregate was not more than $5,733.

Defendants deny that the written premiums for said period (whereby are taken into account a portion of the premiums unearned) exceeded said earned premium figures for said period by only about $4,000,000, and deny that losses and expenses paid were only about $1,000,000 less than said items incurred.

Defendants admit that the business of fire insurance is a distinct and separate class of insurance from other lines of insurance, and was so by the superintendent of insurance considered and construed by the courts of Kansas.

(*d*) Defendants admit that said order was justified in said case by the supreme court of Kansas by holding there should be taken into account all income, to ascertain aggregate experience of all companies during a distinct period, by them derived from the invest-

ment of capital, surplus and unearned premiums, or in other words from all their invested assets; but deny that said order was justified by the supreme court of Kansas by allocating said income to the state of Kansas by taking into consideration as income such ratable part of such income or earnings as the Kansas premiums during such period bore to their premiums throughout the United States.

Defendants deny that said superintendent of insurance, in making said rate order, took into account as income such ratable part of the income or earnings of the insurance companies as the Kansas premiums during the periods under consideration bore to their premiums throughout the United States.

(*e*) Defendants deny that said order was justified by the supreme court of Kansas in said review proceeding by rejecting from consideration the value of the service rendered and rejecting from consideration the cost of service and rejecting the reasonable value of indemnity and rejecting any rate of compensation for hazards undertaken as any basis for said order and by adoption of a base of return on capital and surplus although not employed or existing in the state of Kansas.

(5) Defendants admit that after entry of final judgment in the supreme court of Kansas in said review proceeding in the year 1927, the stock fire insurance companies, petitioners in said review proceeding, inclusive of this plaintiff, jointly applied to the supreme court of the United States for a writ of certiorari to review said judgment of the supreme court of Kansas, which application was denied.

(6) Defendants admit that in order to avoid compliance with said rate order and pursuant to an order of the district court of Shawnee county, Kansas, in said review proceeding, the plaintiff did deposit with the successive defendants, superintendent of insurance, large sums of money representative of the difference between the rates of

premium upon fire insurance theretofore exacted by the plaintiff and those directed and ordered by said rate order to be thereafter exacted, if at lower rates; that is the sum defendants state of 14,314$^{89}/_{100}$ dollars, which said sum of money, together with interest and increment thereof derived upon investment thereof, is still retained and held by the defendant commissioner of insurance, and under his direction and control, and which he withholds from plaintiff, and defendants admit that the plaintiff was further required and compelled by order of the supreme court of Kansas in said review proceeding and upon demand of the defendant superintendent of insurance, therein acting pursuant to said statutes aforesaid, to execute a bond payable to the defendant as superintendent of insurance for the indemnity of policyholders and to insure the ability and power of the plaintiff to make refunds, if necessary, representative of the difference between rates of fire insurance premium charged by the plaintiff at preexisting rates in excess of those directed and ordered by said superintendent of insurance; that is, in the penal sum of 10,081$^{89}/_{100}$ dollars, with the Metropolitan Casualty Insurance Company as surety, to be filed in the month of February, 1928, and that said bond was deposited and delivered to the clerk of the supreme court of the state of Kansas and approved and filed by him within due time, and that the condition of such bond was as set out in paragraph 6 of section third of the bill of equity.

Defendants deny that said deposit of money by the plaintiff with the superintendent of insurance and said execution, delivery and filing of bond by the plaintiff were for the purpose to avoid a confiscation of the property of the plaintiff, and deny that they were required pursuant to a condition unlawfully imposed by the state of Kansas, or order of the district court of Shawnee county, Kansas, or order of the supreme court of the state of Kansas, and deny that the same were unlawfully required by the order of the district court

of Shawnee county, Kansas, or by the order of the supreme court of the state of Kansas, respectively; and deny that said statutes or rate order are void.

(7) Defendants admit that prior to the making of said rate order of January 20, 1922, and since, the plaintiff and other stock fire insurance companies doing business in Kansas did each and all write policies of fire insurance upon uniform rate charges upon hazards in the state of Kansas, but deny that the level of such rates was fixed by basis rates and creation of relativity and an equality in rates throughout the state dependent upon the hazards involved in the several risks, but admit that basis rates were an element in the making of said rates. Defendants admit that said uniform rate charges were filed through the medium of the Kansas Inspection Bureau with the superintendent of insurance for each stock fire insurance company doing business in the state of Kansas, including the plaintiff. Defendants admit that the effect of said filing was to place the charge for insurance by stock fire insurance companies in Kansas upon a uniform level of rates, and that such method and manner of making and creating rates was, long prior to the time of the making of said rate order of the superintendent of insurance, permitted by the statutes of Kansas, and that the same was approved by the superintendent of insurance, but deny that the same was directed by the statutes of Kansas or by the superintendent of insurance. Defendants admit that in addition to basis rates and schedules specific rates or local tariffs were also made and published by said stock fire insurance companies, including the plaintiffs, respecting a great number of parcels of insurable property in the state, which property was inspected and valued and rates published upon the same by said companies, including the plaintiff, and that such publications of rates were uniform as to all stock fire insurance companies in the state, including the plaintiff, but deny that they were

published and validated by direction of law, and deny that they were directed by the statutes of Kansas, but admit that they were permitted by the statutes of Kansas, and admit that they were approved by the superintendent of insurance.

Defendants state that said method of making uniform rate charges was adopted and followed voluntarily by the fire insurance companies, including plaintiff.

Defendants deny that the level of rates existing at the time of the making of said rate order by the superintendent of insurance aforesaid, as the same existed immediately before the making of such rate order, was and is equitable, nondiscriminating, fair and just to the public and insurance companies, and deny that the change of such level of rates as ordered to be changed by said rate order, if applied, would be inequitable, discriminatory, unfair and unjust to the public and to plaintiff and confiscatory as to plaintiff. Defendants admit that the preëxisting rate level has not been departed from, with a few exceptions, but has been maintained and continued respecting charges by fire insurance companies to the present time, by plaintiff and other stock fire insurance companies doing business in the state, and admit that money has been impounded and bonds given as hereinbefore admitted and stated, to warrant and guarantee the responsibility of the plaintiff to make refunds if it be lawfully required so to do.

(8) Defendants admit that they and other persons acting through and in their names will, unless restrained and enjoined by this court, assert the validity of said rate reduction order and the power of the superintendent of insurance to make said rate order, and its application to the plaintiff, and will assert such power under the statutes aforesaid, and will assert claims of hundreds of policyholders against the plaintiff, who had policies of insurance, and that the defendant commissioner of insurance and other persons acting through and in

his name will pay out and deliver the said impounded money to divers persons, and will assert and claim dominion thereof for such purpose, and will assert and claim the right to deliver the same to divers policyholders or former policyholders of the plaintiff, and defendants admit that if it should be necessary so to do and consistent with law, they will sue the plaintiff and the surety upon its bond aforesaid to enforce the penalty thereof. Defendants deny that they will bring or cause to be brought many thousands of suits against the plaintiff on the part of or for the benefit of policyholders, and defendants deny that the defendant, the attorney-general of the state of Kansas, will pay out and deliver the said impounded moneys to divers persons and assert and claim dominion thereof and will assert and claim the right to deliver the same to divers policyholders or former policyholders of the plaintiff. Defendants deny that they will subject said impounded moneys to divers claims and demands of the defendants and others, other than said policyholders.

(9) Defendants deny that the effect of said rate order as originally prescribed was to accomplish a reduction of income of the plaintiff upon its business of fire insurance compared to what it would otherwise be in excess of five (5%) per cent, and if the same were placed in effect and applied to and enforced against the plaintiff, and the plaintiff be required to put such reductions in force that the plaintiff would be required by such action and by the filing of schedules to make effective the said order, to write insurance at such reduced level in excess of five per cent, or that the premiums which the plaintiff collected since the time of such rate order, upon the business of fire insurance, would be reduced to the extent of said impounded moneys and other sums in addition amounting upon the whole to greatly more than five per cent of the plaintiff's premiums of fire insurance, and reduce the premium charges of the plaintiff

in the state of Kansas to an amount wholly inadequate to meet losses and reasonable expenses, or to give reasonable compensation or any compensation to the plaintiff for assuming risks of fire insurance upon the divers classes upon which reductions are so ordered, and deny that it would place the risks of the plaintiff upon a basis of gross inequality and cause the plaintiff to write some risks at rates much less than other risks involving and having the same hazards, and deny that it would destroy any vast machinery asserted by plaintiff to have been built up by the plaintiff and other insurance companies for placing risks upon equality and would cause the same to be so unequal as to subject the plaintiff to prosecution on the ground of discrimination, and deny that to remove any such pretended discrimination the commissioner of insurance would cause and command the plaintiff to reduce divers other charges upon other hazards respecting which no reduction order was made, to place the same upon a basis of equality with those upon which reductions are so ordered.

Defendants admit that divers parts of said rate order were by the district court of Shawnee county, Kansas, in said review proceeding held to be void and beyond the jurisdiction of the superintendent of insurance; that is, the portions of the rate order concerning rates of insurance upon sprinkler leakage, automobile theft, automobile property damage, automobile collision and automobile transportation, and crop insurance. Defendants deny that by the elimination of the said parts of the rate order so held to be void the entire intent of said rate order was destroyed, or that increases designed and intended to offset decreases in said rate order were nullified, or that thereby a further and greater decrease in the income of the plaintiff was produced by the nullification of such parts of said rate order, because of any unwarranted assumption of power by the superin-

ndent of insurance, or that the balance and intent of said rate or-
er were thereby nullified.

Defendants deny that by the said statutes and by the said rate
der thereunder and to the extent the same was finally justified in
e proceeding in the district court of Shawnee county, Kansas, and
the supreme court of the state of Kansas and as the same re-
ained after rulings, orders and judgment thereupon of the dis-
ict court of Shawnee county, Kansas, and of the judgment there-
on of the supreme court of the state of Kansas, and as the same
w exists, that the plaintiff is compelled and forced, if the said
te order be applied to it, to do business of fire insurance in the
ate of Kansas at an actual loss, and upon inequality of rate
harges as between different risks, and at an actual loss to the
laintiff, and great disturbance and loss to the rating structure so
uilt up by the plaintiff, and deny that such rating structure was
uilt up at great cost, and deny the plaintiff, as an alternative, would
e required to withdraw from doing the business of fire insurance in
ansas, and that thereby the value of its agency contracts, and its
gency plants, and good will, and estalbished business, maps, sur-
eys, and records bearing upon its business of fire insurance, which
e plaintiff may have established in Kansas, will be entirely de-
royed, and deny that any such agency plants, good will, estab-
shed business, maps, surveys and records of the plaintiff have been
tablished by it in Kansas at great cost and expense and are of
alue only if it continues doing business in Kansas, and deny that
ey are reasonably worth more than $5,000. Defendants deny
at, in either alternative aforesaid, the plaintiff will be deprived
f its property without due process of law by said rate order as
foresaid, in violation of section 1 of the fourteenth amendement of
e constitution of the United States, or in violation of section 1 of
e bill of rights of the constitution of the state of Kansas.

(10) Defendants admit that the following terms as employed in the bill in equity mean, to wit: That "written premiums" mean all the premiums stipulated in polices executed during a specific period, including earned and unearned portions thereof; that "expenses and losses paid" mean those losses and expenses paid during the period, not taking into account losses and expenses incurred for which liability exists, but which have not in fact been paid during such period; but state they include expenses and losses paid during the period, but incurred before the period; and admit that "earned permiums," as employed in the bill in equity, means the premiums paying for the insurance in force during the specified period, whether written before or during such period, and deny that "incurred losses and expenses," as employed in the bill in equity, means expenses and losses for which liability becomes firmly fixed during the period, whether paid or unpaid.

Defendants allege that losses incurred and expenses incurred are each materially larger than the losses and expenses, respectively, that have been and will be actually paid, respectively, on the subjects covered by such losses incurred and expenses incurred.

Defendants deny that a method of profit or loss accounting is sound which takes earned premiums as an element of income and incurred losses and expenses as elements of outgo, and deny that the method of treating written premiums as an element of income and paid losses and expenses as an element of outgo, and taking into account loss and expense items paid, but applicable to other periods, is an unsound method of accountancy, or that the balance upon such method in no way discloses profit or loss. Defendants state and admit and allege that a part but not all of unearned premiums should be taken into account in any method of profit and loss accounting.

Defendants deny that upon the measure of the individual experience of the plaintiff (taking into account earned premiums as an element of income and incurred loss and expense as elements of outgo during a ten-year period or any other reasonable period before the date of the rate order and during the period since that time), that plaintiff has during each such period, lost money and made no money whatsoever upon the conduct of its business of insurance, or upon its business of fire insurance, in the state of Kansas, and that it has made less than a reasonable profit.

Defendants deny that to reduce the rates of premium upon the business of plaintiff, as is done by said rate order, may not be justified by taking a balance as between written premiums and between losses and expenses, as applied to the aggregate experience of all companies in the state for a ten-year test period, and deny that there may not be thereby justified a reduction of the income of the plaintiff for the future. Defendants deny that the business of the plaintiff has been conducted at a loss, or that said rate order will require the plaintiff to conduct its business at a loss.

Defendants deny that if said rate reduction order should be applied to the business of fire insurance conducted by the plaintiff in the state of Kansas, that it would reduce the rates of premium to be charged by the plaintiff in Kansas to so low a level as to take away all elements for the conflagration hazard and all profit, and compel plaintiff, if it continues doing business, to do so at a loss, and permit plaintiff to receive no compensation whatever, and deny that the plaintiff by the effect of such rate order will be deprived of its property without due process of law, in violation of section 1 of the fourteenth amendment to the constitution of the United States and section 1 of the bill of rights of the constitution of Kansas.

(11) Defendants deny that said rate reduction order was made by the superintendent of insurance upon the basis of consideration

of aggregate profit of all stock fire insurance companies doing business in the state of Kansas, and deny that the individual experience of the plaintiff was in no wise considered by the superintendent of insurance, but state that at the hearing before the superintendent of insurance upon October 17 and 18, 1921, on the question of rates, the stock fire insurance companies, including the plaintiff, submitted figures, statements and arguments with reference to the aggregate or mass experience of all stock fire insurance companies doing business in Kansas, and invited and requested the superintendent of insurance to consider the same, and defendants state that the superintendent of insurance did consider the same, and also considered the separate experience and profit of each stock fire insurance company doing business in the state of Kansas, in the making of said rate order. Defendants deny that there was no evidence warranting or in anywise entitling the superintendent of insurance to make any order as to, or apply the same to the business of, insurance of the plaintiff.

The insurance companies, including the plaintiff, at said hearing before the superintendent of insurance, and in said proceeding in the district court of Shawnee county, Kansas, in the supreme court of Kansas, and in the supreme court of the United States, did not contend that different rates should be in effect for different insurance companies for fire insurance in the state of Kansas. Defendants allege that the plaintiff presented its evidence and arguments in said review proceeding before the referee and the court in the district court of Shawnee county, Kansas, and in the supreme court of the state of Kansas, and in its application for a writ of certiorari to the supreme court of the United States, upon the basis of consideration of the aggregate profit of all stock fire insurance companies doing business in the state of Kansas, and that such rate order was justified by the supreme court of Kansas in view of such presentation by

the plaintiff upon the basis of the consideration of aggregate profit of all stock fire insurance companies doing business in the state of Kansas, and allege that their profits upon their business of fire insurance was in excess of what is reasonable. Defendants deny that said rate order, if applied to the plaintiff, would be in effect to compel the plaintiff to alter and change its rates of charge upon fire insurance and the divers parts thereof, not upon the ground that the plaintiff has made an unreasonable profit or any profit, or that it has suffered a loss upon any parts thereof, or such losses as endanger its solvency, or upon any other consideration affecting it, and deny that the application of such rate order to the plaintiff is upon the sole ground that the supposed experience of other insurance companies alone considered is claimed and asserted to give warranty thereto.

Defendants deny that the schedule of rates under such rate order, if applied by plaintiff as in said rate order directed, would be unfair and discriminatory as to persons insured, or discriminatory and non-compensatory as to plaintiff, and deny that it does not in anywise correspond to, or measure, or have any just or adequate relation to the value of the service and indemnity, or the cost thereof to plaintiff, or the value thereof to the insuring public, or the cost considering experience of well-organized and well-managed fire insurance companies, or the experience and cost to plaintiff.

Defendants deny that said statute was construed and applied by the superintendent of insurance, or the district court of the county of Shawnee, Kansas, or by the supreme court of the state of Kansas, so as to direct the plaintiff to alter its rates upon the basis or ground that other stock fire insurance companies, competitors of plaintiff, have made or are making an unreasonable profit upon their business of fire insurance or some parts or parcels thereof; but state it was construed so as to permit the taking into consideration of such mat-

ters, the insurance companies so requesting and inviting, and admit that said statute was so construed and applied as to permit though not to direct the taking into consideration that the plaintiff has income from sources other than its business of insurance in Kansas, and deny that said statutes as construed and applied confiscate and take property of the plaintiff without due process of law in violation of section 1 of the fourteenth amendment of the constitution of the United States, and section 1 of the bill of rights of the constitution of Kansas.

(12) Defendants admit that section 3 of chapter 152, Laws of Kansas, 1909, which also appears as Revised Statutes of Kansas, 1923, section 40-463, authorized the superintendent of insurance to make said rate order, but allege that said section 3 should be construed and applied in connection with the remainder of chapter 152, Laws of Kansas, 1909, and said section 40-463, Revised Statutes of Kansas, 1923, should be construed and applied in connection with sections 40-461 to 40-474, inclusive, of said revised statutes. Defendants deny that said statute as construed by the supreme court of Kansas and the attempted application thereof by said rate order, and the demand of the superintendent of insurance and the defendant commissioner of insurance, that plaintiff apply the same, and each of them, is unreasonable, confiscatory, unconstitutional and void, as against the plaintiff for any of the reasons in paragraph 12 of section third of the bill in equity referred to.

(*a*) Defendants deny that the superintendent of insurance made his said rate order regardless of whether the plaintiff's experience in Kansas upon its business of fire insurance, or upon all its business, or upon the classes by him in said rate order mentioned, have shown or are showing a profit or a loss but solely upon the consideration of the experience of all stock fire insurance companies for a period next preceding the investigation by the superintendent of insurance, and

deny that the experience upon classes in the rate order mentioned were considered for a period of three years only, and deny that a three-year period was an entirely inadequate and unreasonable period to correct or truly show true averages or just experience, and deny that the power to alter or reduce the rates charged by the plaintiff is made dependent, not upon experience for an adequate period of time, nor upon any consideration of the experience of the plaintiff, but upon the experience of other companies, competitors of plaintiff, in which plaintiff has no interest and over which it has no control, and deny that said order was made upon consideration of said matters for an entirely inadequate period of time. Defendants deny that said rate order of the superintendent of insurance confiscates and deprives the plaintiff of its property without due process of law in violation of section 1 of the fourteenth amendment of the constitution of the United States and section 1 of the bill of rights of the constitution of the state of Kansas.

(*b*) Defendants deny that the business of fire insurance is purely and exclusively a private business, and may be transacted by private persons in their individual capacity, or by unincorporated companies, but admit that the business may be transacted by incorporated companies which comply with the laws of Kansas. Defendants admit that the amount of the indemnity, in practice, but deny that the amount of the premium charge, are matters of private negotiation and agreement, and allege that the amount of the indemnity and the premium charge are subject to regulation under the laws of the state of Kansas. Defendants deny that the business of insurance is a natural right, but admit that in practice it is voluntarily entered into and in some particulars cannot be compelled, but deny it cannot be compelled in some other particulars, and allege that it is subject to regulation under the laws of the state of Kansas. Defendants deny that the fire insurance business of the

plaintiff is not a public business, is not affected with a public interest, or so affected or to such an extent as to empower the state of Kansas to prescribe and regulate the rates of premium charge of the plaintiff by classes. Defendants deny that there is no constitutional power in the state of Kansas to fix the rates and charges for service rendered by plaintiff, and deny that the exercise of power by the state of Kansas to fix the rates and charges for service is the taking of private property for public use and deprives plaintiff of its property without due process of law, or denies to it the equal protection of the laws, in violation of section 1 of the fourteenth amendment of the constitution of the United States and section 1 of the bill of rights of the constitution of Kansas.

(*c*) Defendants admit that said statute as construed and applied delegates to the superintendent of insurance, now the commissioner of insurance, the exercise of legislative power and states it delegates the administration of legislative power, but deny that it wholly fails to provide any standard rule or guide by which such power shall be exercised by him, and leaves the same to the untrammeled whim and caprice of the superintendent of insurance, now the commissioner of insurance, in violation of section 1 of article 2 of the constitution of Kansas.

(*d*) Defendants deny that said statute as construed and applied requires that the ascertainment of aggregate profit of insurance companies and alteration and reduction of rates predicated thereon, as applicable to experience of stock fire insurance companies, inclusive of plaintiff, to be applied to the plaintiff, shall be based upon the amount of premiums written (received) by said stock companies in the aggregate, but defendants allege that said statute as construed and applied permits such ascertainment by such method, in case the plaintiff consents to and requests the application of such method, and that the plaintiff has consented to and requested the application of

such method. Defendants admit that said statute as construed and applied requires that among other things, in considering the question of reasonableness of the fire insurance rates of the plaintiff, there shall be taken into account the amount of premiums written or received by the plaintiff, less losses and expenses by it paid, instead of the amount of premiums earned less losses and expenses incurred, and allege that said statute as construed and applied permits, in case the plaintiff consents and requests, that the same method shall be applied to the aggregate figures aforesaid, and that the plaintiff has so consented and requested. Defendants deny that the profit and loss of an insurance company or insurance companies during any given period cannot be ascertained except by taking into account earned premiums of the period under calculation as income and incurred losses and expenses as outgo. Defendant admits that the superintendent of insurance, in making said rate order, took into account and was by the statute, as construed by the supreme court of the state of Kansas, empowered to take into account premiums written (received) of the plaintiff, but not earned; but deny that he took into account as income incurred but unpaid losses and expenses, and state that he rejected as outgo unpaid but incurred losses and expenses, and that the said statute as construed by the supreme court of the state of Kansas empowered him to do so, and allege that he took into account as outgo paid losses and expenses. Defendants deny that the amount of such premiums written (received) but not earned, was the sum of four million dollars, and deny that the amount of said incurred but unpaid losses and expenses was the sum of one million dollars, and deny that the superintendent of insurance so found, and deny he treated as income or rejected as outgo unpaid losses and expenses in the amount of one million dollars. Defendants deny that said statute as construed as aforesaid as applied to plaintiff thereby prescribes a method of cal-

culation of profit and loss and undertakes thereby to justify a reduction of income of the plaintiff and to upset any sound balance and any equality of hazard theretofore created, and deny that such method is unreasonable, arbitrary, capricious, oppressive, fundamentally erroneous and confiscatory, and if applied to plaintiff that it takes its property without due process of law in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of the state of Kansas.

(*e*) Defendants admit that said statute as construed and applied gives warrant to the superintendent of insurance and that he did in the ascertainment of aggregate profit take into account as income interest derived from investment of assets, namely, interest from invested capital, surplus and reserves, for the periods or terms taken as a test in the making of said rate order. Defendants state that the superintendent of insurance, in ascertaining the profit of the plaintiff, took into account as income interest derived from the investment of its assets, namely, interest from its invested capital, surplus and reserves, for the periods or terms taken as a test in the making of said rate order. Defendants admit that in the making of said rate order the superintendent of insurance took into account income of other stock fire insurance companies doing business in Kansas, many millions of dollars in amount, from interest derived from investment of assets, including interest from invested capital, surplus and reserves, for the periods or terms taken as a test in the making of said rate order. Defendants deny that many of said other stock fire insurance companies had income in amounts much greater than the plaintiff, and deny that the plaintiff had not, nor has it such earnings in any amount in the state of Kansas, or in anywise arising from the operation of its business therein, and deny that the said supposed earnings of the plaintiff, so warranted by statute to be

taken into account, were earnings derived beyond the boundaries of the state of Kansas, or were from the investment of assets of stockholders independent of and in nowise a part of its operations in the state of Kansas, and admit that the sum taken into account was a sum in excess of $2,000,000. Defendants deny that the statute as construed and applied with reference to the plaintiff adopts a method of calculation of supposed profit or loss and justifies reduction of rates upon a basis which is unreasonable, oppressive, fundamentally erroneous and confiscatory. Defendants deny that said statute and the construction applicable thereof as applied to the plaintiff takes the property of the plaintiff without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the state of Kansas.

Defendants deny that reduction of the income of the plaintiff by the application of said rate order is justified and that the rates of the plaintiff are thereby reduced, altered and rendered discriminatory and unjust and inadequate to meet outgo, by the application of the rate order of the superintendent of insurance, or by the statute authorizing the same or by the decision of the supreme court of the state of Kansas in said review proceeding, not because of any discrimination, impropriety, illegality or excessiveness of rates of the plaintiff, and not because of income of the plaintiff from its business in Kansas, and not because of inclusion of income from its investment, or because other companies, competitors of plaintiff, in whose business the plaintiff has no interest and over which it has no control, are asserted to have had in effect discriminatory or excessive rates, or have had interest earnings from their investments or some part thereof supposedly warranting such rate order. Defendants deny that by said rate order the rates of plaintiff are rendered discriminatory, unjust or inadequate to meet outgo. Defendants deny

that the statute as construed and applied as hereinbefore admitted and authorizing said rate order confiscates the property of the plaintiff and deprives the plaintiff of its property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of the state of Kansas.

(*f*) Defendants deny that said rate order, under the construction and application of the statute, embraces classes so small and with such few risks and considered upon so short a period of time and upon statistics of loss experience and by adoption of vocational name groupings, styled classes, and assigned to each of such classes an amount of income purporting to be derived from investment of assets, as to be arbitrary, capricious, unreasonable and confiscatory. Defendants deny that a determination of probability upon which a rate charge may justly and soundly rest cannot be made justly or reasonably upon a predicate of the period of time employed by the superintendent of insurance, and deny that in divers of such classes the amounts of the premiums and the losses even over long periods of time are so trivial and insignificant as to furnish no basis for segregated experience thereon by consideration of the same within the boundaries of the state of Kansas, and deny that in none of said groupings are, or were, there risks sufficient in quantity or extending over a period adequate, or losses over a period of time sufficiently long upon which to base any conclusions except arbitrary conclusions, and defendants deny that a minimum experience period proper for consideration in any case for this class or other experience is five years, and deny that a period of five years is inadequate when applied to risks covered by the classes contained in said rate order within the state of Kansas, and deny that a reasonable period for consideration of the same upon all the business of fire insurance in the state would be as much as ten years, and defendants deny that

three or five or ten years, or either, are entirely inadequate in spread, considering the number of risks involved, as respects the classifications made in the rate order. Defendants deny that in determining the propriety of rate charges or in fixing the same, the same is by uniform practice of insurance companies and by skilled raters affixed upon a consideration of hazards inhering in risks potentially existing, and deny that the difference in rates upon less inflammable structures, such as brick buildings and upon wooden buildings, is made by insurance companies and skilled raters irrespective of statistical loss experience over any period of time. Defendants admit that any methods whereby potential hazards conjectured as inhering in property and in its location, exposure, construction, and protection form the predicate for fixing rate charges, cannot be justly applied by consideration of such methods alone or independently of loss experience, and admit that loss experience was taken into account by the superintendent of insurance in making said rate order, and that the taking of loss experience into account was justified by such statutes. Defendants deny that the grouping by vocational names of classes in said rate order is productive of inequality and arbitrary rate charges and that the effect thereof in application is to produce increases in fact where decreases are ordered and decreases in fact where increases are ordered, and that the same is productive of a complete dislocation and destruction of the entire rate structure built up by contribution of insurance companies inclusive of the plaintiff. Defendants deny that any such rate structure has been built up by contribution of insurance companies, inclusive of the plaintiff, at great cost, with the express approval of the state of Kansas and its commissioner of insurance. Defendants deny that such vocational name groupings of classes are in nowise definitive of the hazards involved, and deny that on the contrary they incorporate into such groupings entirely variant hazards, and produce differ-

ence in charges upon identical hazards whereby gross favoritism and disparity of rate charges are produced. Defendants deny that said rate order, made by the superintendent of insurance under powers created and delegated by the statute, if put into force, would result in inequalities and the destruction of the business of the plaintiff. Defendants deny that by analysis of hazards inhering in insured property rate charges have, by the plaintiff and all other stock fire insurance companies, for many years past, been applied by the determination of the hazards inhering in such property, and that the controlling element of any such hazards in the fixing of rate charges have been and are dependent upon consideration of the element of structure, exposure, inflammability and damageability of the contents, and protection, public and private, against fire loss, and deny that by the methods adopted by the plaintiff and all other stock fire insurance companies in fixing fire insurance rates equality of rate charges is created and maintained. Defendants deny that by the process followed by the plaintiff and other stock fire insurance companies in the formulation and application of rates that the plaintiff has spent large sums of money and that the stock fire insurance companies have in the state of Kansas expended hundreds of thousands of dollars with the approval of the state of Kansas and its insurance department, and deny that by such methods an equality of charge respecting such several ingredients of charge or hazard have been created and established as between different properties, even though differing in their physical kind, and as between public and private buildings, and deny that thereby a body of fair and reasonably compensatory rates have been built up and that such rates were applied and charged before the making of said rate order.

Defendants deny that by the terms of said rate order, as justified by said statutes, the same, if applied, would have the effect of reducing the rate charges of the plaintiff upon fire insurance to the

extent of more than five per cent, and to that extent would reduce rates below a reasonable, just and nonconfiscatory rate charge for the hazards and risks assumed. Defendants deny that said rate order, justified by said statute, if applied to plaintiff, would be destructive of income and compensation to the plaintiff, and would cause it great loss by disturbance of the relation between the parts of the body of the fire insurance rates of the plaintiff, and by and in addition to making specified reductions of rates, making certain increases of rates. Defendants deny that the increases of rates by such rate order are impractical of application. Defendants admit that the plaintiff has to the present time declined and refused to put the increases in rates required by said rate order in force and effect, and deny that the plaintiff cannot put such increases in force and effect without suffering any loss. Defendants admit that the superintendent of insurance had no jurisdiction by said rate order to order rates into effect upon sprinkler leakage, automobile theft, automobile property damage, automobile collision and automobile transportation, and crop insurance, but allege that he did have such jurisdiction as to hail, windstorm and tornado insurance. Defendants deny that as to those matters concerning fire insurance rating on which the superintendent of insurance in said rate order ordered an increase of rates that the same are in great part highly competitive in their nature and that the plaintiff has competition therein from mutual insurance companies and reciprocal insurers, or that the same do a large amount of business in the state of Kansas, and compete with the plaintiff, or more particularly in such classes in which increases of rate were ordered. Defendants deny that if the plaintiff shall undertake to and shall put such increases as respects fire insurance directed by said rate order into force and effect, its business in such classes would in many of the classes be entirely lost by the plaintiff and in others would be in great part

lost so that such increases would not produce additional income to the plaintiff, but if sought to be put into effect would greatly reduce its income. Defendants deny that in the case of sprinklered risks, the same are in sharper competition with other classes of insurers than is true with any other classes of business. Defendants have no knowledge and therefore deny that in the case of railway risks, the same are almost universally interstate and that insurance is written covering the line of railways, whereby the insurer seeks to and secures insurance respecting its entire line, assigning the part thereof ratably to the state of Kansas, and deny that said risks are written by master policies with subsidiary policies in the several states, and that if too great a part be affected as applicable to Kansas by virue of increase as by said rate order provided, that the result thereof would be that the cost of the whole insurance upon the line would be so far in excess of the hazard and risk involved that said railways would cease to carry insurance upon their properties in Kansas, and that the railroad companies would in such case carry their own risk, but admit that some of the railroad companies are able to carry their own risk. Defendants admit that as to public buildings in general the owners thereof are in position, because of distribution of the risk, to carry their own risk, if they see fit to do so, more often than in the case of private owners, and deny that the rate charges ordered by said rate order upon public buildings would cause the owners of said public buildings to discontinue their insurance with the plaintiff and carry their own risk. Defendants deny that the increases in said rate order are destructive and injurious to the business of the plaintiff, and thereby productive of loss and confiscation to the plaintiff if enforced.

Defendants admit that said rate order directs a reduction in rates as respects breweries, distilleries, rectifying works and malt houses, but deny that such reduction was based upon Kansas experience.

Defendants have no knowledge and therefore deny that no such structures exist or have existed in the state of Kansas for more than twenty years past, but admit that the same could not lawfully be erected in Kansas at the time of the making of such rate order.

Defendants deny that if the charges directed by said rate order were to be enforced the same would result in arbitrary, unsound and illogical classifications, and deny that the basis adopted by the superintendent of insurance of predicating the same upon experience is unsound, and deny that in many of said classes there are only a nominal number of risks in the state and in many of said classes as few as five or six risks in the state comprised in such supposed classes. Defendants deny that in affixing rate of charge upon such hazards the plaintiff and the rating bureau have done so upon consideration and analysis of the physical fire hazards inherent therein and taken into account any inherent hazards shown by experiment in laboratories and by consideration of such hazards nation-wide by judgment of engineers and others expert in weighing and analyzing hazards therein existing, and deny that to readjust and alter the charges upon the method and plan by the superintendent of insurance adopted, and by said statute justified, is to destroy all relation between the charge of premium for such insurance and the hazard in such insured property existing, and to destroy all equality of charge and to subject the plaintiff to constant risk of prosecution and charge of discrimination and unfairness of rate charge, and to make worthless and of no account its rating machinery, and deny that it has built up its rating machinery at great expense, and deny that the method adopted by the superintendent of insurance of determining rates in said rate order is inadequate and arbitrary.

Defendants deny that the enforcement of such rate order will cause gross inequalities and discriminations and unfair rate charges measured one against the other, and deny that the enforcement of

such rate order will be productive of such criticism, dissatisfaction and complaint by its customers and prospective customers that great amounts of business which otherwise would flow and come to the plaintiff will be diverted to mutual insurance companies and reciprocal insurers, and that large numbers of persons will reduce the amount of insurance they otherwise would purchase, or will carry their own risk, and deny that the enforcement of such rate order will produce great loss to the plaintiff. Defendants deny that said statute, as construed and applied, confiscates the property of plaintiff and deprives plaintiff of its property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of Kansas.

(*g*) Defendants deny that said statute as construed and applied makes no provision for notice to the plaintiff respecting any application to it of the charges by such rate order, and deny that the plaintiff had no notice of the proposal or of the intent of the superintendent of insurance to make readjustment by classes as by him made, nor opportunity to protest, nor object thereto, and deny that the plaintiff had no notice or opportunity to be heard as respects the application thereof to the plaintiff, and deny that there was no consideration or opportunity for consideration of the propriety or impropriety, justice or injustice, confiscatory or nonconfiscatory effect of such rate order, as applied to and considered in the light of any experience of the plaintiff, and deny that such rate order was made without notice or hearing or opportunity thereof to the plaintiff, and admit that such rate order has been justified by the supreme court of Kansas under said statute. Defendants deny that said statute as so construed and applied deprives plaintiff of its property without due process of law, in violation of section 1 of the fourteenth

amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of Kansas.

Defendants deny that the said rate order of January 20, 1922, invades the constitutional rights of the plaintiff and deprives it of its property without due process of law, and deny that said statute of Kansas is invalid and that said rate order is invalid and deny that said rate order deprives the plaintiff of its liberty and property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of the bill of rights of the constitution of Kansas.

Defendants admit that the plaintiff is a well-established and well-organized fire insurance company with assets adequate to discharge and meet its liabilities, but deny that it is economically and soundly conducted and that throughout the period which it has been engaged in business in the state of Kansas it has conducted its business soundly, prudently and economically.

Defendants deny that in the plaintiff's business of fire insurance a reasonable method of affixing charges for its policies is by analysis of the hazards inhering in property insured, and making charges upon the basis of such hazards, or making what may be supposed to be reasonably compensatory charges upon the basis of such hazards. Defendants deny that such charges and the compensation arising therefrom cannot be gauged or judged as to any particular policy as respects the experience of any particular property, and deny that it can be gauged or judged in the light of the hazards to some other properties over large areas and over long periods of time, but admit and allege that the experience of loss and damage to the particular property for a considerable time and to similar properties over considerable areas and for considerable periods of time should be taken into account in fixing rate charges, but deny that the same should be taken into account only over large areas and over long periods of

time for such purpose, and deny that in making such rate charges there should be taken into account losses incurred and expenses incurred in the conduct of such business of insurance, but allege there should be taken into account for such purpose as bases or starting figure losses paid and expenses paid. Defendants deny that a reasonable margin to meet the hazards of conflagration and for profit for underwriting and furnishing indemnity as a reasonable standard, has been and by consensus of opinion is considered to be, and deny that it is five per cent of the earned premium charge, upon the earned premium and incurred loss and incurred expenses basis, in addition to three per cent for conflagration. Defendants deny that the fire insurance rates existing prior to the making of the rate order by the superintendent of insurance in the bill set forth were predicated upon a sound and reasonable basis, and that the application thereof over many years of time had produced a smaller than a reasonable margin to be anticipated upon making application thereof. Defendants deny that less than a reasonable compensation has been and is being derived by the plaintiff for the hazards by it assumed upon the business of fire insurance and that at and prior to the time of the making of said rate order plaintiff derived less than a reasonable compensation for the conduct of its business, and defendants deny that its income would be still further reduced were said rate order to be applied to it and its business.

FOURTH.

(1) Defendants deny that unless this court grants the relief prayed in the bill of equity and if said rate order should be enforced the plaintiff would sustain irreparable injury and damage, in that the plaintiff would be compelled either to issue policies of insurance and conduct its business in Kansas at an actual loss and suffer disorganization and destruction of its established business, or that plaintiff would be compelled to cease doing business in the state of

Kansas and thereby lose entirely its agency contracts, agency plants, established business, maps, surveys, rating records and good will, and defendants deny that such agency contracts, agency plants, established business, maps, surveys, rating records and good will of the plaintiff are of great pecuniary value. Defendants admit that if said rate order should be enforced and applied to plaintiff and the plaintiff should refuse to comply therewith the defendant commissioner of insurance will proceed to revoke the licenses of plaintiff and its agents on its behalf to do business in the state of Kansas. Defendants are without knowledge in case such rate order should be enforced and applied to the plaintiff and the plaintiff should refuse to comply therewith, whether defendants will institute and prosecute criminal actions against the plaintiff and its agents in Kansas, and whether plaintiff and its agents will thus be subjected to prosecution to recover many thousands of dollars in fines and penalties.

Defendants deny that if said rate order should be enforced against the plaintiff that the plaintiff will suffer loss upon the continuance of its business in Kansas if said rate order be not enjoined, and deny that any such loss will occur from day to day in the amount of a large sum of money every day the plaintiff would be required to write insurance at the rates in such rate order prescribed.

(2) Defendants admit that the defendants have asserted and if not enjoined will assert and publish to the insuring public of Kansas that the premium charges at the rate at which plaintiff has been exacting the same and which it proposes to exact upon its contracts of fire insurance, if it should not comply with said rate order, namely, the rates existing prior to the entry of the rate order, are unlawful; but deny they have asserted that the public need not pay or contract to pay the same to the plaintiff, or that they will so assert before judgment in said review proceeding shall be entered in

the district court of Shawnee county, Kansas, pursuant to the mandate from the supreme court of Kansas and to the judgment of that court. The defendants are without knowledge whether in any such contingency many persons would be induced to refuse and to decline to take insurance with the plaintiff, and to pay premium charges to the plaintiff which it may and would demand and exact upon its insurances on properties in the state of Kansas. Defendants are without knowledge, unless they be enjoined, whether they will bring, or cause to be brought, proceedings to enjoin or interfere with the collection by the plaintiff of such premium charges, and whether they will cause actions and proceedings to be brought against the plaintiff and against its officers, directors, employees and agents; but if such proceedings should be brought defendants deny that in any such suits any enormous and excessive fines and penalties would be prescribed by the laws of Kansas for violation of the said laws of said state, or would be imposed. Defendants are without knowledge, if they be not enjoined and the plaintiff should continue to exact the rate charges which it has been exacting, whether each issuance of a policy by or on behalf of plaintiff would be treated as a separate violation of law and each exaction of premium treated as a separate and distinct offense, and whether the defendants in any such contingency will bring or cause to be brought actions to impose fines and penalties against representatives of the plaintiff before mentioned; but admit that in such contingency they will bring and institute proceedings to revoke and cancel licenses of the plaintiff and its agents in Kansas and will, unless restrained, refuse renewal of the license of the plaintiff and of its agents in Kansas, upon the ground of failure to conform to said rate order. Defendants deny that said statute or said rate order is void. Defendants are without knowledge whether in any contingency aforesaid divers persons would commence and institute action through

and in the name of defendants and would subject the plaintiff to great and irreparable loss and damage and would subject plaintiff, its officers, employees and agents to a multiplicity of suits, and whether divers proceedings would be brought by policyholders and others against the impounded premium funds of the plaintiff, and upon a bond given by it as aforesaid, and whether any such actions would be brought in the name of the defendants. Defendants deny that any such actions of the defendants, if taken, would each be a trespass by the defendants under a void rate order or under a void and unconstitutional law. Defendants deny that thereby great or irreparable damages would be sustained by the plaintiff and that it would be impossible to adequately and legally measure the amount and extent of any such damage, and deny that any such conduct and actions of the defendants, if taken, would deprive the plaintiff of its property and its liberty of contract without due process of law and deny to plaintiff the equal protection of the laws. Defendants deny that they have threatened to and unless restrained and enjoined by this court will take unlawful and unconstitutional action against, and thereby interfere with, the business of the plaintiff.

Defendants deny that plaintiff has no plain, adequate or complete remedy at law and that no relief can be afforded to the plaintiff from the operation and effect of the actions of the defendants against the plaintiff and its property, save only in a federal court of equity, and that unless such relief is granted the property of the plaintiff will be confiscated and the plaintiff will suffer irreparable loss and injury. Defendants deny that their actions have been or will be arbitrary, confiscatory and unconstitutional.

Defendants deny that immediate and irreparable loss and damage will result to plaintiff unless a temporary restraining order is granted without notice and an interlocutory judgment is granted. Defendants admit if the plaintiff should comply and conform with

the said rate order and write its insurance at the rates of premium therein ordered and directed and if subsequently it should be held by this court that such rates prescribed by such rate order are confiscatory, or that the said statutes or said order are illegal or unconstitutional, and that the operation of said statutes or the operation of said rate order are unconstitutionally applied to the plaintiff, that in some instances it would be impossible for the plaintiff ever to recover or collect from the person taking insurance with the plaintiff the amounts representing the difference between the rates of premiums so collected and the rates of premiums which it might be held by this court in the contingency aforesaid, if it should be so held, that the plaintiff is legally entitled to charge and receive, but alleges that in many instances it would be possible for the plaintiff to recover or collect such amounts from the persons taking insurance from the plaintiff. Defendants admit that in many cases such differences in premiums are small, but that they are large in the aggregate, and admit that in some instances the cost and expense of undertaking collection thereof would exceed the amounts therein respectively involved, but allege that in many other instances such cost and expense would be much less than the amounts respectively involved. Defendants deny that the difference between said rates collected by the plaintiff, without application of the rate order, and rates with said rate order applied, when applied to the business by the plaintiff conducted from day to day in the state of Kansas, would amount to not less than ten dollars each day, and deny that the same would be irreparably lost to the plaintiff. Defendants deny that the temporary restraining order prayed for in the bill in equity should be granted without notice to the defendants and that immediate and irreparable injury and damage will result to plaintiff before notice can be served on defendants and a hearing had.

Defendants deny that if they should receive advance notice of

plaintiff's application for a temporary restraining order before the hearing thereof they will have it within their power and they will proceed in divers ways to enforce the said rate order and the execution thereof as against the plaintiff, and that they will institute a multiplicity of suits against the plaintiff, and that they will proceed to revoke the license of plaintiff, its agents and representatives, to do business in Kansas, and cause or permit proceedings to be instituted in their names upon the bond above cited against the plaintiff and its surety thereon.

FIFTH.

(1) Defendants state that the rate order referred to in the bill in equity, made by Frank L. Travis, then superintendent of insurance of the state of Kansas, on January 20, 1922, and provided therein to take effect on March 1, 1922, was made by him pursuant to authority vested in him by chapter 152, Laws of Kansas, 1909, and chapter 207, Laws of Kansas, 1917, and chapter 45, Laws of Kansas, 1920; that prior to the making of said rate order, the said superintendent of insurance, upon August 10, 1921, notified the plaintiff insurance company and other stock fire insurance companies doing business in the state of Kansas, through W. C. Hodges, their attorney in fact, at Topeka, Kan., of a hearing to be had before said superintendent of insurance at his office in Topeka, Kan., upon October 17, 1921, on the subject of fire and tornado insurance rates; that by letters of September 12 and September 28, 1921, delivered on or about said dates, respectively, to said Hodges, in said capacity, said superintendent of insurance requested the plaintiff and said other stock fire insurance companies to furnish certain information at said hearing; that said hearing was held in the office of the superintendent of insurance at Topeka, Kan., upon October 17 and 18, 1921, and that at said hearing said superintendent of insurance re-

quested the plaintiff and the other stock fire insurance companies represented to furnish certain information; that on December 14, 1921, representatives of the plaintiff and said other companies furnished said superintendent of insurance certain documents and data. On January 20, 1922, said rate order was made and issued by said superintendent of insurance, a copy of which is set out in the bill in equity, and the same was delivered to the plaintiff and many other stock fire insurance companies by said superintendent of insurance at that time.

(2) Defendants state that on February 16, 1922, the plaintiff and one hundred twenty-four other stock fire insurance companies filed their petition in a suit in the district court of Shawnee county, Kansas, against Frank L. Travis, superintendent of insurance of the state of Kansas, as defendant, pursuant to section 9, chapter 152, Laws of Kansas, 1909, which later appeared as section 40-469, Revised Statutes of Kansas, 1923.

Said petition alleged, among other things, that general basis schedules showing the rates on all classes of risks insurable by the plaintiffs respectively in Kansas, and all charges, credits, terms, privileges and conditions which in anywise affect such rates, or the value of the insurance issued to assureds, as changed by subsequent filings, covering property in Kansas, to be charged and collected by the plaintiffs, and each of them, upon all policies of insurance issued by them respectively upon property in Kansas, had been filed on behalf of the plaintiffs respectively by their attorneys in fact in the office of the superintendent of insurance of Kansas, and were on file in that office.

Said petition alleged, among other things, that the only proper or sound basis to determine whether rates of the insurance companies were reasonable or adequate is the combined experience of all companies doing business in the state of Kansas, and that at

said hearing, which began October 17, 1921, before the superintendent of insurance, figures and data showing the combined experience of such companies in the state of Kansas for a period of years were submitted to said superintendent. Said petition alleged that the effect of said rate order would be to reduce the premiums to be collected by the plaintiffs, and each of them, on business written by them in the state of Kansas in the year 1922 and thereafter to such an extent that incurred losses plus incurred expenses would exceed earned premiums, and the effect of said rate order would be to reduce the rates of premiums to be charged and collected by the plaintiffs, and each of them, upon all policies of fire and tornado insurance issued by them, respectively, covering property in Kansas, to a point below what is reasonable and adequate to the various risks covered by such policies, for the reason that the rates of premiums which the plaintiffs would be entitled to charge and collect in the state after March 1, 1922, the effective date of said rate order, would be unreasonably low and inadequate to the safety and soundness of the plaintiffs and confiscatory, and that the enforcement thereof would result in irreparable injury and damage to the plaintiffs, and each of them, and that if they should be obliged because of said rate order to cease writing fire and tornado insurance in Kansas, large sums of money expended by them and each of them in their respective agency plants, would be wholly lost, and the good will of the business of the plaintiffs and each of them totally destroyed, and whether they should write business under said rate order in Kansas or cease to do business in Kansas because of said rate order, the plaintiffs and each of them, would be deprived of their property without just compensation and without due process of law, contrary to the provisions of the constitution of Kansas and contrary to the provisions of that portion of section 1 of the fourteenth amendment of the constitution of the United States which

provides that "no state . . . shall . . . deprive any person of life, liberty or property without due process of law."

In said petition the plaintiffs alleged, among other things, that to meet conflagration hazard a sum should be set aside by each fire insurance company equal at least to the rate of three per cent of the premium receipts for each year, and that a fair and reasonable underwriting profit on the business written by the plaintiffs, respectively, in the state of Kansas is at least five per cent of the earned premiums for each year, and that the classification experience furnished by the plaintiffs to the defendant, covering the years 1918, 1919 and 1920, did not fairly reflect the business of the plaintiffs under normal conditions, and that the combined fire and tornado business transacted by the plaintiffs in Kansas for the period January 1, 1910, to December 31, 1920, showed an underwriting profit of only 2.85 per cent.

In said petition the plaintiffs alleged, among other things, that the said notice given to W. C. Hodges, their attorney in fact, by the superintendent of insurance, dated August 10, 1921, was insufficient, and they also alleged in said petition that no notice of any kind was given to the plaintiffs or any of them or to said W. C. Hodges, their attorney in fact, of the making of said order, and that no opportunity was given to the plaintiffs or any of them to appear or be heard concerning the same, and that the effect of such rate order would be to cause aggregate reductions of premium receipts of the plaintiffs of $987,097.35, or a reduction of approximately 6.68 per cent upon the total premium receipts of the plaintiffs for the year 1920; and that the effect of said rate order would be to reduce the premiums to be collected by the plaintiffs and each of them in Kansas in the year 1922 and thereafter to such an extent that incurred losses plus incurred expenses would exceed earned premiums; and that the effect of said rate order would be to further reduce the

premium receipts of plaintiffs and each of them upon fire insurance written by them covering property in Kansas to a point below what would be reasonable and adequate to the various risks covered by the policies, and would make the rates of premium unreasonably low and inadequate to the safety and soundness of the plaintiffs, and confiscatory, and the enforcement of such rates would result in irreparable damage and injury to the plaintiffs and each of them.

The plaintiffs in said petition prayed that pending the final determination of the cause they be permitted to charge and collect for insurance written by them after March 1, 1922, the rates which obtained prior to that date, upon condition that the difference between the rate collected and the rates which would have been collected under said order had the suit not been filed, be deposited with the superintendent of insurance of the state of Kansas, but subject to and in such manner as the court might by its order direct, and that upon the final hearing of the cause, the court order, adjudge and decree that said order be set aside, vacated and annulled, and that the plaintiffs have such other and further relief in the premises as the nature of their case might require and as to the court might seem meet.

On or about April 14, 1922, in said case the defendants filed a demurrer to said petition on the grounds of misjoinder of the parties plaintiff, that several causes of action were improperly joined, that the petition showed upon its face the plaintiffs were not entitled to the relief demanded, and that the petition did not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiffs, or either of them.

Said demurrer was argued to the court by the attorneys for the parties and was by the court overruled.

On or about September 2, 1922, the plaintiffs in said suit in the district court of Shawnee county, Kansas, filed therein an amend-

ment and supplement to said petition, on the subject of the repayment or the depositing of the collections by the insurance companies of the parts of rates in excess of the rates fixed by the order of the superintendent of insurance, and of the giving of a bond by the defendant to secure the repayment of such excess moneys to the plaintiffs.

Upon or about March 31, 1925, the plaintiffs in said suit in the district court of Shawnee county, Kansas, filed an amendment to that petition. Said amendment to the petition, among other things, alleged as follows: That said rate order was null and void in that it changed the classification of risks and the basis schedules, charges, credits, terms, privileges and traditions of the plaintiffs without notice to them and without affording them an opportunity to be heard with reference thereto, and by substituting therefor classes based upon the occupation of the assured, and furnished no reasonable basis for such classification, and distinguished between different parties assured whose property is subject to the same probability of fire hazard; and that said order and the provisions thereof were unreasonable and destructive of the plaintiff's business, void and beyond the power of the superintendent of insurance and in violation of chapter 152, Laws of Kansas, 1909, and also in violation of section 1 of the bill of rights of the constitution of Kansas and of the fourteenth amendment of the constitution of the United States, in that it deprived plaintiffs of their property and of the equal protection of the law without due process of law; and that said order was not predicated upon an excessiveness of rates; and that the superintendent of insurance did not find that the rates in force at the time of the entry of the order were excessive or unreasonably high, and the plaintiff alleged that the same were not excessive or unreasonably high; and the plaintiffs alleged that such order was not predicated upon any basis that the existing rates were inade-

quate to the safety and soundness of the plaintiff companies, and that the order made no finding that the rates were not so adequate; and plaintiffs alleged that said rates were not inadequate to the safety and soundness of the plaintiffs, and that the said order was wanting in jurisdiction in that the same was predicated upon the basis that the existing rates were inequitable, unjust and not commensurate with the character and hazards of the risk. The plaintiffs alleged in said amendment to petition that the question of the equitable character of the level of the rates, or any injustice of the level of the rates, or any opinion of the superintendent of insurance that the level of the rates was commensurate or incommensurate with the character of the risk, were not by law intrusted to him; and that the plaintiffs were not by law debarred from using their own judgment as to the equitable and just character of the level of the rates, and whether the same were commensurate with the character and hazards of the risks; and that the order in seeking to exercise visitorial powers over the internal affairs of the plaintiffs and to substitute the judgment of the superintendent of insurance for that of the directors and officers of the plaintiffs, and in so altering and changing the level of rates and the relation of the various parts thereof one to the other, and in so seeking to alter, change and readjust the same and the relation of the parts thereof upon the grounds in the order recited, and in each and every of the changes made by the superintendent of insurance, the said superintendent of insurance by the order deprived the plaintiffs and each of them of their property without due process of law, in violation of section 1 of the bill of rights of the constitution of Kansas and of the fourteenth amendment to the constitution of the United States.

Plaintiffs allege in said amendment to petition that said order was in violation to the fourteenth amendment to the constitution of the United States and section 1 of the bill of rights of the con-

stitution of Kansas, in that it constituted an unwarrantable and unauthorized interference with the business of plaintiffs and attempted regulation of the business, rates and charges of plaintiffs, and that the regulation by such order, if complied with, would materially injure the business of plaintiffs in that it would compel plaintiffs to charge excessive rates for comparative lines of business, thereby driving all such business to insurance corporations and associations of other classes, and compel plaintiff to charge unremunerative and confiscatory rates for other classes of business.

The plaintiffs in said amendment to petition alleged that in the event chapter 152 of the Laws of Kansas, 1909, should be so construed as to authorize the superintendent of insurance to take into account in ordering a reduction of rates, interest earnings of the stock fire insurance companies, including plaintiffs, upon any part of their capital and surplus, or upon unearned premiums, or unearned premium reserves, or to take into account earnings of said companies from any source other than from underwriting in connection with risks located in Kansas, or to base the determination of profit and loss of such companies upon premiums received and losses and expenses paid by them, as distinguished from the basis of premiums earned and losses and expenses incurred, in such event said chapter 152 would be unconstitutional and void, and in violation of section 1 of the fourteenth amendment to the constitution of the United States, in that such construction of said statute would render it confiscatory, and would deprive the plaintiffs and each of them of their property and property rights without due process of law, and would deny to them the equal protection of the laws, and said statute would in such event be unconstitutional and void and in violation of section 1 of the bill of rights of the constitution of the state of Kansas in that such construction of said statute would deprive plaintiffs of their property rights.

The plaintiffs in said amendment to petition alleged that the purpose and intent of chapter 152 of the Laws of Kansas, 1909, apart from preventing discrimination, was to enable the superintendent of insurance to prevent the plaintiffs and others similarly situated from exacting from the policyholders of the state of Kansas in the aggregate an unreasonable amount in the way of premiums charged for insurance written, and that it was not its purpose and intent to enable the superintendent of insurance to usurp the powers normally vested in the owners of said insurance companies and the power to classify the various risks insured against.

Plaintiffs alleged in said amendment to petition that by said order the superintendent of insurance exceeded the powers given by the statute, and attempted not only to supervise and regulate the amount of money in the aggregate which should be charged by the plaintiffs for insurance written in Kansas, but has undertaken to usurp the normal powers of the management of said insurance companies by fixing and determining in great detail the particular classifications and schedules or rates which the companies should charge among the different classes of assureds; and that by reason thereof the order was vold because in excess of the powers granted by the statute.

Plaintiffs alleged in said amendment to petition that if said statute should be construed to give to the superintendent of insurance powers in excess of the powers to determine the aggregate amount of rates which should be charged by the plaintiffs for insurance written, or should be construed so as to give the superintendent of insurance power to determine in detail the particular premium which should be charged upon each risk, that said statute would be unconstitutional and void in that it would deprive the plaintiffs of the equal protection of the laws and of their property and property rights in contravention of the first section of the fourteenth amendment of

the constitution of the United States and of section 1 of the bill of rights of the state of Kansas.

Plaintiffs alleged in said amendment to petition that in the event chapter 152, Laws of Kansas, 1909, should be construed so as to authorize the superintendent of insurance to regulate the expenses of stock fire insurance companies doing business in Kansas, or to authorize him to consider properties, income and activities of foreign stock fire insurance companies outside of Kansas with reference to their business in Kansas, in such event said statute would be unconstitutional and void and in violation of section 1 of the fourteenth amendment to the constitution of the United States, and of section 17 of the bill of rights of the constitution of Kansas, in that said statute would in such event give to the superintendent of insurance visitorial powers over the internal management of said companies, and would invade the right of said companies to conduct and manage their own affairs, and would be an unreasonable interference with their right of management thereof, and would deprive them of their property and property rights without due process of law, and would deprive them of the equal protection of the law, and as to said foreign stock fire insurance companies would discriminate against them in favor of domestic stock fire insurance companies, in reference to the purchase and employment of their property.

Defendants filed an answer of general denial to said petition and the amendments thereto.

Defendants state that by virtue of chapter 152, Laws of Kansas, 1909, and of section 9 thereof, it was open to the plaintiff and to other plaintiffs in said suit to present by their petition or amendments thereto and by evidence, arguments and briefs any questions attacking the validity of said rate order of January 20, 1922, under the laws or constitution of Kansas and under the constitution of the

United States, whether any such questions should or could be sustained or adjudicated in favor of the plaintiffs.

Defendants allege that on the trial of said case before the referee, in the district court of Shawne county, Kansas, and in the presentation of said case upon appeal in the supreme court of the state of Kansas, and on the petition of plaintiff to the supreme court of the United States for the issuance of a writ of certiorari, the plaintiffs in said case, including the plaintiff in this case, presented questons concerning the validity of said rate order under sections 1 and 17 of the bill of rights of the constitution of the state of Kansas and under section 1 of the fourteenth amendment of the constitution of the United States, as well as under the provisions of said chapter 152, Laws of Kansas, 1909.

Defendants deny that in said case, at any stage thereof, in either of said courts, any claim or allegation by the plaintiffs therein of any unconstitutional invasion of their rights was not or could not have been considered or determined.

Defendants allege that in the introduction of evidence and their presentation of their case by the plaintiffs in said case in the district court of Shawnee county, Kansas, before the referee and before the court, the plaintiffs, including the plaintiff herein, voluntarily and of their own free will, introduced evidence and presented their case on the subject of the effect of such rate order upon the plaintiffs by figures in the aggregate or mass relating to all of the plaintiffs, and also voluntarily and of their own free will, presented their case and introduced some evidence relating separately to a few of the plaintiffs in said case.

Defendants deny that the district court of Shawnee county, Kansas, or the supreme court of Kansas, in said case held that the insurance rate regulation statute of Kansas in question required or compelled the insurance companies, including this plaintiff, to make,

or the superintendent of insurance to order or require, the insurance companies, including this plaintiff, to make rates upon the experience, profit or loss, or figures in the aggregate or mass, relating to more than one insurance company, or to any insurance company or companies other than each particular complaining plaintiff, respectively, in that case.

In said case in the district court of Shawnee county, Kansas, and upon the appeal thereof to the supreme court of Kansas, and upon their petition and argument to the supreme court of the United States for a writ of certiorari, the plaintiffs, including this plaintiff voluntarily and of their own free will, presented their contentions and relied and argued on said aggregate or mass figures, and that their separate constitutional rights were injured or destroyed by said rate order in violation of the provisions of section 1 of the fourteenth amendment to the constitution of the United States.

(3) Plaintiffs state that on or about June 20, 1923, the plaintiff filed an amended motion in said case in the district court of Shawnee county, Kansas, which motion alleged, among other things, that said rate order was void for the reasons that it was entered without such notice or such hearing as was required by the statutes of Kansas; that it included rates upon classes of insurance over which the superintendent of insurance had no jurisdiction under the statutes of Kansas; that it covered matters not included in the notice of the hearing which was served by the superintendent of insurance, and that it was entered without preliminary findings required by the statutes of the state of Kansas.

Said amended motion was argued by and on behalf of the parties to the case and was heard in the district court of Shawnee county on or about June 21, 1923. On or about August 11, 1923, said court decided, ordered and adjudged upon the questions presented by said amended motion, and the plaintiffs in said case thereafter filed

motion for rehearing of such questions and a motion for a new trial thereof, and such motions having been heard by the court were by it overruled; and on or about October 30, 1923, the said court made its order and judgment upon the questions presented by said amended motion, and the points submitted to it by the plaintiffs and argued to it by the parties, and thereby decided, ordered and adjudged, among other things, that the superintendent of insurance had no authority to fix or order a change of rate of insurance for sprinkler leakage, automobile theft, automobile property damage, automobile collision, automobile transportation and crop insurance; and that the portions of said rate order pertaining to said classes of insurance were void and of no effect, and ordered that the differences in premiums thereupon which had theretofore been impounded under said rate order, should be refunded to the plaintiffs, and that no further impounding differences in rates as to such portions of the rate order should be made by the plaintiffs.

It also thereby decided, ordered and adjudged that the superintendent of insurance of Kansas had authority to fix and make rates of insurance; that he had authority to make the rate order of January 20, 1922; that said order was entered upon the notice referred to in said order and upon no other further or different notice, and that such notice was sufficient to comply with the statute and to confer jurisdiction upon the superintendent of insurance, and the application of the plaintiffs for an order of court holding that such notice was insufficient and that such rate order was void, for that reason was denied.

Defendants state that upon the second Monday of January, 1923, William R. Baker, succeeded Frank L. Travis as superintendent of insurance of the state of Kansas, and upon or about January 27, 1923, by order of the court said William R. Baker, as said superin-

tendent of insurance of the state of Kansas, was substituted in said case as defendant instead of Frank L. Travis.

(4) Defendants state a referee was appointed in said case by said district court to hear evidence and to make a report to the court of his findings of fact and conclusions of law upon the issues in the case. Hon. Gilbert H. Frith, of Emporia, Kan., was appointed and qualified as such referee. Evidence was presented to him by the plaintiffs and the defendant in said case and arguments made to him on their behalf, and on or about June 23, 1925, he filed his report in said case in said court, including his findings of fact, conclusions of law and addenda thereto. Thereafter each of the parties filed exceptions to certain portions of said report, findings, conclusions, and addenda, and each also filed motions for a new trial of said issues with reference to said report, findings, conclusions and addenda thereto, of said referee. Thereafter there was an additional hearing of the parties of some points before the referee, and additional findings of fact were made by said referee and reported to the court.

Defendants state that on or about October 15, 1925, the plaintiffs in said case filed a motion for leave to make thirty-seven stock fire insurance companies doing business in Kansas additional parties plaintiff to said case and said proposed additional parties and plaintiffs filed a consent and waiver in said case by which they adopted the allegations in the petition and amended petitions and amendments thereto and the reply and replies filed by the original plaintiffs and all motions and pleadings that the original plaintiffs had theretofore filed in the case, and acknowledged themselves bound by any and all orders theretofore made by the court and by the evidence offered therein before the court or before the referee, and adopted each and all of the tenders, offers, statements and admissions theretofore made by the original plaintiffs, and adopted the

exceptions made by the original plaintiffs to the statements and evidence offered by the plaintiff.

Defendants state that on or about the same date the court made an order admitting said proposed additional plaintiffs to the number of thirty-seven to be made parties plaintiff in said suit, and granting leave to file said amendment to the petition and making said additional parties plaintiff and admitting the consent and waiver by said proposed additional plaintiffs.

Defendants state that on or about the same date all parties in said suit, including said additional plaintiffs, made and filed therein a stipulation whereby it was agreed between said parties that the answers of the defendant to the petition and the amendments thereto of the plaintiffs should be deemed to be the answers of the defendant to the same as adopted by said additional plaintiffs, and also to the amendments to the petition filed for the purpose of bringing in said additional plaintiffs, and also that all the evidence which had been offered or introduced by either party should be deemed to have the same effect as if said additional plaintiffs were plaintiffs in the case at the time of introducing of such evidence, and that all the motions, rulings, orders and proceedings theretofore had in said case and objections and exceptions made or waived by either the plaintiffs or the defendant should have the same effect as if said additional parties plaintiff were parties plaintiff at the times thereof, and said stipulation agreed upon the dates when said additional parties plaintiff had begun doing business in Kansas.

The defendants state that upon October 14, 15 and 16, 1925, the motions and exceptions of the parties addressed to the report, findings of fact, conclusions of law and addenda of the referee were argued before the said district court, and briefs were submitted by the parties.

Defendants state that on or about October 24, 1925, the said

district court rendered its decision and judgment in said case, whereby it held and adjudged among other things that the premium rates ordered into effect by the superintendent of insurance in said rate order of January 20, 1922, with regard to tornado insurance were reasonable and just and the order in so far as it applied to tornado insurance was sustained, and the report, findings of fact and conclusions of law of the referee with reference thereto were sustained.

By said judgment the court held and adjudged that the report of the referee and his findings of fact and conclusions of law respecting insurance rates embraced in said order, excepting only as to rates on tornado insurance, should be and the same were approved and adopted, to the effect that the same were unreasonable and unjust, and by said judgment of the court the order of the superintendent of insurance, excepting only as the same affected rates of premium charged upon tornado insurance, was set aside, vacated and annulled; that the plaintiffs were not longer compelled or required to impound with the superintendent of insurance any insurance premiums; that the motion of the defendant for a new trial and the exceptions of the defendant to portions of the report, findings, conclusions and addenda of the referee were overuled; that the motions of the plaintiffs and exceptions of the plaintiffs to portions of the report, findings, conclusions and addenda of the referee were overruled. By tornado insurance the court meant tornado, windstorm and cyclone insurance.

Defendants state that the district court did not adjudge that said rate order was void because it attempted to adjust rates according to occupancy or vocational classification, or without regard to the fire hazard contained in the individual risk, but adjudged against the contention thereupon of the plaintiffs, which contention was to the effect that such order was void for that reason.

The court reserved jurisdiction of the case for the purpose of entering any and all further orders respecting the parties for the carrying out of its order, judgment and decree.

Thereupon, in due time, the superintendent of insurance, defendant in said cases, filed a motion for a new trial of said case in said district court, which motion was overruled by said court, and the said superintendent of insurance, in due time, took and perfected an appeal to the supreme court of the state of Kansas from said judgment of the district court of Shawnee county, Kansas, so far as related to the portion of said judgment pertaining to rates other than rates on tornado insurance.

(5) Upon said appeal of said case by the defendant in the district court to the supreme court of the state of Kansas, wherein said defendant was the appellant, and said insurance companies, parties plaintiff in the district court in said case, where appellees, briefs were submitted and arguments were made on behalf of the parties before said supreme court, and thereafter the said court filed an opinion and rendered a decision and judgment in said case, whereby among other things it was held and adjudged that the proper test of underwriting profits of the insurance companies, appellees, was not earned premiums less incurred losses and expenses, but that there should be considered in determining underwriting profits, among other things, the entire unearned premiums of the plaintiffs as income or assets, and that if any part of the unearned premiums during the test period was used for the payment of losses or expenses, a showing should have been made of the amount so used and the amount not so used; that all premiums should be rated as receipts, which, together with other receipts, if any, of the underwriting business, constituted the income for the period under consideration, and from the amount of such income should be deducted

actual losses and expenses and the difference would represent underwriting gains or profits; that it was incumbent upon the plaintiffs to show the amount of their underwriting receipts which should be set aside as a reserve to pay future losses and expenses on existing policies, and that such expenses and losses were in fact paid from such fund; but if future losses and expenses upon existing policies are in fact paid from future receipts, there is no reason for allowing the setting aside of such reserve, and that the method adopted by the referee and the district court of adding 35 per cent of unearned premiums to earned premiums for the purpose of computing income or profits of plaintiffs was not based upon any actual showing of the true amount of unearned premiums, which were in fact earnings or profits, and that the method of the referee and district court of treating premiums in computing the income of profits of the plaintiffs was erroneous, and could not be sustained; that the referee had found that unless the method employed by him in determining underwriting profits, that is, of deducting incurred losses and expenses from earned premiums plus 35 per cent of unearned premiums, was correct, then the rate order was not unreasonable, and that the supreme court had determined that this method was incorrect.

The supreme court directed that the judgment of the district court, so far as it related to the portions of said rate order pertaining to rates other than tornado rates, be reversed, and that the judgment by the district court be entered in favor of the superintendent of insurance, appellant, the defendant below.

Defendants state that thereafter in due time the insurance companies, appellees, filed with said supreme court a petition for rehearing of said case, and such rehearing was granted by that court. Two arguments were had before said court in said case after such rehearing was granted, and additional briefs were filed by the parties. The last argument was had on account of the fact of a

change in the composition of the court after the last prior argument thereto.

Defendants state that after said arguments and the consideration of additional briefs of the parties thereon by the supreme court of the state of Kansas upon such rehearing of said case, the said court, on or about October 8, 1927, filed an opinion and rendered a decision and judgment in said case whereby it adjudged that the judgment of the district court be reversed with direction to enter judgment for defendant, the superintendent of insurance. Said judgment of the district court so reversed pertained to the portion of said rate order upon rates other than tornado rates. By said judgment of the supreme court, its prior decisions and judgments, to the extent the same are heretofore alleged, were adhered to, and in addition, among other things, the court held and adjudged the premium rates to produce a fair return to which the appellees, stock fire insurance companies, were entitled should be such as would allow a fair return upon the present value of their capital used and useful in the insurance business, allocated to the state upon the consideration of all the insurance business transacted by such companies within the state compared with such business transacted by them elsewhere; and that in determining their profits consideration should be given to all earnings of such companies, including receipts from investments, and that if the reasonableness of fire insurance premium rates were to be determined from the underwriting business only, it would be essential that it be shown what part of the premiums, if any, ultimately became profits; and that paid losses and expenses should be considered and not incurred losses and expenses as to underwriting profit, and it should be shown what part of the premiums ultimately became profit, and that the appellees had not made such a showing; that the district court had decided against the appellees upon the question of the order fixing rates according to occupancy or voca-

tional classification of the property insured, and making increases and decreases ordered upon a percentage of the final return rather than the basic return. The court held and adjudged that the plaintiffs had made no effective cross appeal upon this question, but that if the question were before it, that it would reach the same conclusion as that reached by the referee and the trial court, that the order was not void for any such reason, and that the order had not been shown to be unreasonable and confiscatory.

(6) Later and within due time the insurance companies, appellees in said case, filed a petition with the supreme court of the United States for a writ of certiorari to the supreme court of Kansas, in said case, in order that the supreme court of the United States should review such decision of the supreme court of Kansas, and urged in the petition for the writ of certiorari and supporting brief that said judgment of the supreme court of Kansas was in violation of section 1 of the fourteenth amendment to the constitution of the United States. On or about March 5, 1928, the supreme court of the United States denied said petition for a writ of certiorari. Thereafter in due time the mandate from the supreme court of the United States to the supreme court of Kansas, setting forth such denial of the petition for the writ of certiorari, was transmitted by the supreme court of the United States to, and was received by, the supreme court of the state of Kansas.

On account of such petition to the supreme court of the United States and of the bringing of this suit, wherein this answer is filed, and one hundred forty-nine similar other suits, by stock fire insurance companies, in the district court of the United States for the district of Kansas, first division, a mandate from the supreme court of the state of Kansas to the district court of Shawnee county, Kansas, pursuant to the said holding and judgment of the supreme court of the state of Kansas, has not yet been transmitted, and for the

same reasons, and on account of the nontransmittal of such mandate the final judgment of the district court of Shawnee county, pursuant to said judgment of the supreme court of the state of Kansas, has not yet been made or entered, and said case by the various stock fire insurance companies, including the plaintiff, is still pending in the condition above stated in the supreme court of the state of Kansas.

Upon motion of the plaintiffs in said case and pursuant to authority granted by section 9, chapter 152, Laws of Kansas, 1909, the district court of Shawnee county, Kansas, on or about February 16, 1922, made an order concerning the impounding of differences between the premium rates fixed by said rate order and the premium rates which had theretofore been charged by the plaintiffs, and upon or about February 27, 1922, on motion of the defendant, the district court made a modified order upon the same subject. By the first of said two orders it was provided that the plaintiffs and each of them were permitted to write insurance at the rates which obtained prior to the date upon which the rate order was to have gone into effect, that is, March 1, 1922, upon condition that the excess of the rates which obtained prior to such date, over the rates named in said rate order, be deposited with the superintendent of insurance, and on the final determination of the suit the amount so deposited would be paid to the plaintiffs and each of them, respectively, if the court should find them entitled to the same, or to the holders of the respective policies written by said companies in case said order of the superintendent of insurance should be finally approved and sustained, and it was provided in said order that such excess amounts should be paid by the plaintiffs respectively to the superintendent of insurance on or before sixty days after the end of the calendar month in which the respective policies should be written.

By said modified order it was provided that the plaintiffs and

each of them were permitted to write insurance at the rates provided in said rate order, where such rates had been increased by said order, upon condition that the amount of premiums received because of such increases should be paid to the superintendent of insurance, and that the same should be retained by him until the final determination of the action, and if upon such determination the court should find the rate order to be fair, reasonable and adequate, such increase should be paid to the plaintiff companies respectively, but that if the court should find such increases were unreasonable and unnecessary the amount so collected should be returned to the policyholders as determined by the court, and it was provided by the court that the plaintiffs and each of them should pay such amount so collected because of the increase of rates to the superintendent of insurance on or before sixty days after the end of the calendar month in which the respective policies should be written.

Defendants state that the plaintiffs and each of them have continued to write insurance at the rates which had been in effect prior to March 1, 1920, and for the period March 1, 1920, to August 31, 1925, each of the plaintiffs has deposited with the superintendent of insurance under said order of February 16, 1922, amounts which they represented to the superintendent of insurance constituted the excess of the premium rates collected by them over the premium rates which were ordered to go into effect March 1, 1922, by said rate order.

Defendants state that in those instances where the said rate order directed an increase of rates, the plaintiff did not comply with said rate order and charge such increased rates, but charged and collected lower rates, except as hereinafter stated, and that the plaintiffs have not made any deposits with the superintendent of insurance under said modified order of February 27, 1922.

Defendants allege that the plaintiffs have put into and maintained in effect higher rates of automobile fire insurance than were

in effect at the time of the issuance of said rate order, or at the time that said rate order was directed by the superintendent of insurance to be put into effect.

Defendants state that upon or about September 9, 1922, by consent of the parties, the district court of Shawnee county, Kansas, made an order in said case providing that the said differences in rates deposited by the plaintiffs in said case with the superintendent of insurance therefor and thereafter should be by the superintendent of insurance deposited with the Central Trust Company, of Topeka, to the credit of the defendant, to be paid out or withdrawn from the trust company only upon orders of the court.

Thereafter from time to time by consent of the parties the court made orders designating various other banks and trust companies in which said differences in rates paid or to be paid by the respective plaintiffs to the superintendent of insurance should be by him deposited.

Said differences in rates as represented by the plaintiffs, which were paid by the respective plaintiffs to the superintendent of insurance, were by him deposited with the various banks and trust companies so designated by the court.

Defendants state that by an order of the court made on or about May 27, 1924, it was provided that said banks and trust companies from April 9, 1924, should pay interest upon said moneys so deposited by them at the rate of two per centum per annum on average daily balances, less the cost of securing a surety upon a surety bond to be furnished by each of said trust companies and banks, which cost of procuring such surety should not in any case exceed the rate of one-half of one per centum for a period of one year upon such average daily balances of deposits, and by said order it was further provided that each of the said banks or trust companies should file in court a surety bond or bonds running to the superintendent of

insurance, his successor or successors in office, for the use and benefit of the parties finally determined to be entitled to the money in question, in order to secure the repayment of said moneys deposited in said respective trust companies and banks.

Defendants state that in said appealed case in the supreme court of the state of Kansas, on or about November 28, 1927, the supreme court of the state of Kansas made an order requiring the appellees insurance companies to execute and to file with the clerk, subject to approval, surety bonds to equal the payment by them of the differences in such premium rates for the period September 1, 1925, to October 31, 1927, inclusive, in all cases where the premium rates collected by the insurance companies upon risks other than tornado risks should be in excess of the rates prescribed by said rate order; and most of said companies have executed and filed such bonds with the clerk of said supreme court and the same have been approved, and defendants are informed that the remaining companies are preparing to file such bonds with the clerk of the supreme court.

Defendants allege that in said suit which was brought by stock fire insurance companies as plaintiffs in the district court of Shawnee county, Kansas, the petition of the plaintiffs and the amendments to said petition, and which petition and amendments to said petition were adopted by the additional plaintiffs who became such plaintiffs after the beginning of the suit, did not allege a joint cause of action in favor of the plaintiffs and against the defendant therein, but alleged several and distinct causes of action in favor severally of each of the plaintiffs therein and against the defendant therein; that the defendant therein filed a general denial to said petition and to the amendments to said petition. The issues in said case were presented by said petition and amendments to said petition and by the general denial of the defendant, and the case was tried in the district court of Shawnee county, Kansas, upon the issues thus pre-

sented, and the judgment of the supreme court of Kansas, herein referred to, in said case upon appeal in that court, was rendered upon the issues thus presented.

Defendants state that the alleged causes of action of the plaintiffs, in said suit in the district court of Shawnee county, Kansas, and in the supreme court of the state of Kansas, so far as the same related to this plaintiff, is the same as the alleged cause of action in the bill in equity of the plaintiff in this suit.

Defendants state that the said order and judgment of the district court of Shawnee county, Kansas, of, on or about August 11 and October 20, 1923, upon questions of law presented by the amended motion of the plaintiffs and by the plaintiffs in argument and brief on said motion, and the judgment of the district court of Shawnee county, Kansas, of, on or about October 25, 1925, on the subject of classification of rates in said order by occupancy or vocation, and on the subject of tornado rates, and the said judgment of the supreme court of the state of Kansas of, on or about October 8, 1927, and the said denial by the supreme court of the United States of a petition by the plaintiffs for a writ of certiorari, are in full force and not reversed and are *res judicata* and conclusive upon the plaintiff herein, and a bar to the maintenance of the pretended cause of action set out in the bill in equity in this case, and by reason thereof this court has no authority or right, and has no jurisdiction, to render or enter any order, decree or judgment herein in favor of the plaintiff, but that the bill in equity and suit should be dismissed at the costs of the plaintiff.

SIXTH.

Defendants state that section 9 of chapter 152, Laws of Kansas, 1909, said chapter being entitled "An act relating to fire insurance, and to provide for the regulation and control of premiums thereon

and prevent discrimination therein," provided, among other things referring to any regulation of order made by the superintendent of insurance with reference to fire insurance rates, that:

". . . If any insurance company, or any other person, city or municipality which shall be interested in said order shall be dissatisfied with any regulation, order or rate adopted by said superintendent of insurance, said party or parties shall have the right within thirty days after the making of said regulation or order to bring an action against said superintendent of insurance in any district court of the state of Kansas to have such regulation or order vacated, . . ."

Said supervision aforesaid was reënacted and continued in effect by section 40-469, Revised Statutes of Kansas, 1923.

Defendants state that section 17 of article 3, chapter 93, being consecutive section 6907 of the General Statutes of Kansas, 1915, provided as follows: "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: Third, within two years: . . . an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated." Said provisions hereinbefore referred to in the General Statutes of Kansas, 1915, were reënacted and continued in effect by section 60-306, Revised Statutes of Kansas, 1923. The actions referred to as thereinafter enumerated were not of the character of the pretended cause of action asserted in the bill in equity in this suit.

Defendants state that the rate order of the then superintendent of insurance, Frank L. Travis, was issued January 20, 1922, and it was provided therein that it should take effect on March 1, 1922. Defendants state that if the plaintiff ever had any cause of action on the matters and things alleged in the bill in equity of the plaintiff herein it accrued on January 20, 1922, and more than thirty days and more than two years before the beginning of this suit. By reason of each of the statutes of limitations hereinbefore pleaded,

the pretended cause of action asserted in the bill in equity was barred long prior to the beginning of this suit, and the plaintiff has no right to maintain any such pretended cause of action.

Wherefore, defendants pray that the said bill in equity and suit be dismissed at the costs of plaintiff.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Asst. Attorney-general of the State of Kansas,
JOHN F. RHODES,
Solicitors for Defendants.

APPENDIX F.

(Title of Cause Omitted.)

ORDER.

Now on this 18th day of May, 1929, this cause coming on to be heard on the motion of plaintiff for an interlocutory injunction, and notice having been given to the defendants of application therefor, and the court being fully advised in the premises:

And thereupon, in open court, the defendants announced that they would not refrain or agree to refrain from the cancellation of plaintiff's license, and the licenses of plaintiff's agents, but demanded the assembling of a three-judge court to pass upon this motion of the plaintiff for an interlocutory injunction. The plaintiff announced that it does not at this time request a three-judge court.

The court doth find that plaintiff has an established business and agencies in the state of Kansas created under license from said state, and that the defendant, Chas. F. Hobbs, commissioner of insurance of the state of Kansas, threatens to cancel license of the plaintiff, and that if not restrained said Chas. F. Hobbs will proceed to cancel the license of plaintiff and its agents in the state of Kansas, and that the concellation thereof will result in loss of such established business and agencies and will result in irreparable damage to plaintiff; and,

Now, therefore, it is ordered by the court, That the defendant, Chas. F. Hobbs, and his attorneys and agents, and each of them, be and they are hereby restrained and enjoined from in anywise canceling license of plaintiff to do business in the state of Kansas because of any supposed violation by plaintiff of the rate order made by the superintendent of insurance of Kansas, issued Janu-

ary 20, 1922, effective March 1, 1922, and from canceling the license of plaintiff's agents on account thereof: *Proviaed*, That the plaintiff shall give a bond with sufficient surety in the penal sum of one thousand dollars ($1,000), conditioned to pay such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by this order. Bond in proper form, with plaintiff as principal and Hartford Accident and Indemnity Company as surety, being now tendered, is hereby approved.

It is further ordered by the court, That this interlocutory injunction shall be and it is hereby ordered to remain in force and effect until the final hearing of said cause, or until the further order of the court.

An identical order will be entered in each of the cases pending in this court, numbered 962-N and 964-N to 1111-N, inclusive.

To the above and foregoing order and every part thereof the defendants except.

(Signed) JOHN C. POLLOCK, *Judge*.

APPENDIX G.

(Title of Cause Omitted.)

ORDER.

Now, on this 18th day of May, 1929, appeared before Honorable John C. Pollock, judge of this court, at his chambers at Kansas City, Kansas, Robert J. Folonie and Robert Stone, solicitors for plaintiff, and John G. Egan and John F. Rhodes, solicitors for defendants, and at the hearing of the application of the plaintiff for an interlocutory injunction the defendants called up and presented to the court their motion that the judge of this court call to his assistance two other judges to hear and determine the application of the plaintiff for an interlocutory injunction as by law provided, and particularly by section 266, as amended, of the judicial code, U. S. code, title 28, section 380, and the judge of said court, Honorable John C. Pollock, stated that he did not consider that the motion now presented required three judges and he would not hear said motion now, to which ruling the defendants then and there excepted.

At the same time the same proceedings as above took place in 149 other similar cases against the same defendants, by various insurance companies as plaintiff, and numbered 962-N and 964-N to 1111-N, inclusive, in this court, and defendants made the same exceptions, and this order applies to said 149 other cases as well as to the above-entitled case.

(Signed) JOHN C. POLLOCK,
U. S. District Judge.

O. K. as to form.
R. J. FOLONIE,
ROBT. STONE,
Solicitors for Plaintiff.
W. A. SMITH,
J. G. EGAN,
J. F. RHODES,
Solicitors for Defendants.

APPENDIX H.

Chapter 152, Session Laws of Kansas, 1909.

CHAPTER 152.

RELATING TO FIRE INSURANCE, AND PROVIDING FOR REGULATION AND CONTROL OF RATES OF PREMIUM THEREON.

(Senate bill No. 538.)

AN ACT relating to fire insurance, and to provide for the regulation and control of rates of premium thereon, and to prevent discriminations therein.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That every fire insurance company shall file with the superintendent of insurance general basis schedules showing the rates on all classes of risks insurable by such fire insurance company in this state, and all charges, credits, terms, privileges and conditions which in anywise effect [*affect*] such aforesaid rates or the value of the insurance issued to assured.

SEC. 2. No change shall be made in the schedules which have been filed in compliance with the requirements of this act, except after ten days' notice to the superintendent of insurance, which notice shall plainly state the changes proposed to be made in the schedules then in force and the time when such changes will go into effect; and such changes shall be shown by filing new schedules or shall be plainly indicated on the schedules in force at the time; provided, that the superintendent of insurance may, in his discretion and for good cause shown, allow changes upon less than the notice specified herein, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

SEC. 3. When the superintendent of insurance shall determine that any rate made by an insurance company in this state is ex-

cessive or unreasonably high, or that said rate is not adequate to the safety or soundness of the company granting the same, he is authorized to direct said company to publish and file a higher or a lower rate, which shall be commensurate with the character of the risk, but in every case the rate shall be reasonable.

SEC. 4. That no fire insurance company shall engage or participate in the insurance of any property located in this state unless the schedule of rates under which such property is insured has been filed in accordance with the provisions of this act; nor shall any fire insurance company write any insurance at a rate different than the rate named in its schedules, or refund or remit in any manner or by any device any portion of the rates so established, or extend to any insured or other person any privileges, advantage, favor, inducement or concession, except as is specified in such schedule.

SEC. 5. Any fire insurance company entering into any contract of insurance on property located within this state for which no rate has been filed by such company, as provided in section 1 of this act, shall within thirty days after entering such contract file with the superintendent of insurance, in such form as may be required by him, a schedule of such property showing the rate thereon and such information as may be required by such superintendent of insurance. Such schedule shall conform to the general basis schedules, as provided in section 1 of this act, and when filed shall constitute the premium rate of such company for the described property.

SEC. 6. That all schedules and local tariffs filed in accordance with the provisions of this act shall be open to the inspection of the public, and each local agent shall have and exhibit to the public copies thereof relative to all risks upon which he is authorized to write insurance.

SEC. 7. That no fire insurance company shall directly or indirectly, by any special rate, tariff, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less or different compensation for the insurance of any property located in this state than it charges, demands, collects or receives from any other person or persons for like insurance or risks of a like kind and hazard under similar circumstances and conditions in this state; and any fire insurance company violating any of the provisions of this section shall be deemed guilty of unjust discrimination, which is hereby declared to be unlawful.

SEC. 8. That the superintendent of insurance, if he shall find that any insurance company, or any officer, agent or representative thereof, has violated any provisions of this act, may, in his discretion, revoke the license of such offending company, officer, or agent; but the revocation of any license, as provided in this section, shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty hereinafter provided by any other section for violation of this act: *And provided,* That any action, decision of determination of the superintendent of insurance under the provisions of this act shall be subject to review by the courts of this state as herein provided.

SEC. 9. The superintendent of insurance shall not make any regulation or order without giving the insurance company concerned reasonable notice thereof and an opportunity to appear and be heard in respect to the same, and if any insurance company, or any other person, city or municipality which shall be interested in said order shall be dissatisfied with any regulation, order or rate adopted by said superintendent of insurance, said party or parties shall have the right within thirty days after the making of said regulation or order to bring an action against said superintendent of insurance

in any district court of the state of Kansas to have such regulation or order vacated, and shall set forth in the petition the particular regulation or order complained of and the particular cause or causes of objection to any or all of them, and a summons shall be served upon the superintendent of insurance by delivering a copy thereof to his office at the state capitol, and such service may be had by the clerk delivering a certified copy of said summons by mail to the said superintendent of insurance at his office. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature; and the court may set aside, vacate or annul one or more or any part of any of the regulations or orders adopted or fixed by the said superintendent of insurance, which shall be by said court found to be unreasonable, unjust, excessive or inadequate to compensate the company writing insurance thereon for the risk assumed by it without disturbing others. No injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the superintendent of insurance shall be granted: *Provided,* That the court may permit any company complaining under this act to write insurance at any rates which obtained prior to the ordering of the rate complained of, by the superintendent of insurance, upon condition that the difference between the rate complained of by the company and the rate at which it seeks to write insurance may be deposited with the superintendent of insurance, and on the final determination of the suit shall be paid by him to the insurance company, if the court shall find it entitled to the same, or to the holders of policies written by said company after the rate complained of was ordered by the superintendent of insurance, as the court may deem just and equitable. Whenever any action shall be brought by any insurance company under the provisions of this section within said period of thirty days, no penalties or forfeiture shall attach or accrue on account of the failure of the plaintiff to comply with the order

sought to be vacated or modified in said action until the final determination of said suit. Either party to said cause, if dissatisfied with the judgment or decree of said court, may institute proceedings in error in the supreme court as in other civil cases, and said court shall examine the record, including the evidence, and render such judgment as shall be just and equitable in the premises. No action shall be brought in any of the courts of the United States to set aside any order made by the superintendent of insurance under the provisions of this act before all of the remedies provided for herein shall have been exhausted by the party complaining. And if any company organized under the laws of this state, or authorized to transact the business of insurance in this state by the superintendent of insurance, shall violate this section, the superintendent of insurance may cancel the authority of said insurance company to transact business in this state.

SEC. 10. That any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company, who alone, or with any other corporation, company or person, shall willfully do or cause to be done, or shall willfully suffer or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or who shall willfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this act to be done, not to be done, or shall be guilty of any infraction of this act, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine not to exceed one hundred dollars for each offense: *Provided*, That if the offense for which any person shall be convicted, as aforesaid, shall be an unlawful discrimination, such person shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county

jail for a term not exceeding ninety days, or by both such fine and imprisonment.

SEC. 11. No person shall be excused from giving testimony or producing evidence, when legally called upon so to do, at the trial of any other person charged with violation of any of the provisions of this act, on the ground that it may tend to incriminate him under the laws of this state; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence under the authority of this act, except for perjury committed in so testifying: *Provided,* That nothing in this act shall effect [*affect*] farmers' mutual insurance companies organized and doing business under the laws of this state and insuring only farm property.

SEC. 12. This act shall take effect and be in force from and after its publication in the statute book.

Approved March 5, 1909.

APPENDIX I.

Section 1 of Chapter 207, Session Laws of Kansas, 1917.

AN ACT supplementary to article 9, chapter 53, of the General Statutes of 1915, authorizing the superintendent of insurance to investigate fire insurance rates and rating bureaus and making appropriation therefor.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. The superintendent of insurance, upon written complaint of any citizen or upon his own motion, is hereby empowered to investigate all fire insurance rates. In making an investigation the superintendent of insurance, or any of his assistants, shall have the power to visit, inspect or examine all rating or actuarial bureaus maintained or used by any fire insurance company authorized to do business in this state whenever he deems it expedient. In case any rating or actuarial bureau shall refuse to permit visitation, inspection, investigation or examination as herein provided, the superintendent of insurance may refuse to permit any schedule of rates made by such bureau to be filed by any fire insurance company in this state. A special assistant shall be appointed by the governor to assist the superintendent of insurance in carrying out the provisions of this act.

APPENDIX J.

Section 40-222 of Chapter 231, Session Laws of Kansas, 1927.

REVOCATION OF COMPANY LICENSE.

SEC. 40-222. Whenever the commissioner of insurance shall deem it necessary he may make, or direct to be made, an examination of the affairs and financial condition of any insurance company in the process of organization, or applying for admission or doing business in this state. For the purpose of such examination the commissioner of insurance, or the persons appointed by him, for the purpose of making such examination shall have free access to the books and papers of any such company that relate to its business and to the books and papers kept by any of its agents and may examine under oath, which he or they are hereby empowered to administer, the directors, officers, agents or employees of any such company in relation to its affairs, transactions and condition: *Provided,* That he shall examine every insurance company doing business in this state at least once in three years. In lieu of such examination, the commissioner of insurance may accept the report of the examination made by or upon the authority of the supervising insurance official of any other state. Whenever it appears to the commissioner of insurance from such examination or other satisfactory evidence that the solvency of any such insurance company is impaired, or that it is doing business in violation of any of the laws of this state, or that its affairs are in an unsound condition so as to endanger its policyholders, the commissioner of insurance shall, before filing such report or making the same public, grant such company upon reasonable notice, a hearing, and, if on such

hearing the report be confirmed, he shall suspend the certificate of authority of such company until its solvency shall have been fully restored and the laws of the state fully complied with; and he may, if there is an unreasonable delay in restoring the solvency of such company and in complying with the law, revoke the certificate of authority of such company to do business in this state. Upon revoking any such certificate he may communicate the fact to the attorney-general, whose duty it shall be to commence and prosecute an action in the proper court to dissolve such company or to enjoin the same from doing or transacting business in this state.

APPENDIX K.

Section 40-242 of Chapter 231, Session Laws of Kansas, 1927.

REVOCATION OF AGENT'S LICENSE.

SEC. 40-242. The commissioner of insurance shall have the right to revoke or suspend the license of any agent in the event that investigation by him discloses the fact that such license was obtained by fraud or misrepresentations or that the holder of such license had misrepresented the provisions, terms and conditions contained in any contract of insurance or that the holder of such license has rebated the whole or any part of any insurance premium to the applicant for such insurance, or that the holder of such license has made any misleading representations or incomplete comparison of policies to any person for the purpose of inducing or tending to induce such person to lapse, forfeit or surrender his insurance then in force, or in the event that the interests of the insurer or the insurable interests of the public are not properly served under said license: *Provided, however,* That the commissioner of insurance shall, before revoking or suspending any license, give to the agent, and the company or companies represented by him or her, reasonable notice of a hearing to be held by the commissioner of insurance, at which hearing such agent and the company or companies represented by him or her shall be given full opportunity to present such evidence as they deem pertinent to the issue involved.

APPENDIX L.

Section 266, as Amended, of the Judicial Code.

SEC. 380. (*Judicial code, section 266, amended.*) *Same; alleged unconstitutionality of state statutes; appeal to supreme court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the supreme court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the supreme court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the supreme court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the supreme court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the supreme court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the state, and to such other persons

as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the supreme court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the supreme court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney-general of the state, that the suit in the state courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court

may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, sec. 17, 36 Stat. 557; Mar. 3, 1911, c. 231, sec. 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938.)

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12-7563

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In the Supreme Court
of the United States.

No. 20, Original—October Term, 1929.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the state of Kansas, for a Writ of Mandamus to the HONORABLE JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

MOTION OF PETITIONERS FOR LEAVE TO FILE A REPLY.

REPLY OF PETITIONERS TO THE RETURN OF RESPONDENT.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Asst. Attorney-general of the State of Kansas,
JOHN F. RHODES,
Attorneys for Petitioners.

13-1162

In the Supreme Court of the United States.

No. 20, Original—October Term, 1929.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the state of Kansas, for a Writ of Mandamus to the HONORABLE JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

MOTION OF PETITIONERS FOR LEAVE TO FILE A REPLY TO THE RETURN OF THE RESPONDENT.

Come now the petitioners in the above-entitled case and state to the court that the return of the respondent, Honorable John C. Pollock, contains certain denials of allegations in the petition and makes certain allegations for the purpose of a defense. The petitioners desire leave to file a reply to said return to put in issue certain allegations contained therein. A copy of said reply is submitted herewith, and also a brief in support of this motion. The petitioners pray leave to file the reply.

CHARLES F. HOBBS,
Commissioner of Insurance of the State of Kansas,
and
WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
Petitioners.

By WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Asst. Attorney-general of the State of Kansas.
JOHN F. RHODES,
Their Attorneys.

In the Supreme Court of the United States.

No. 20, Original—October Term, 1929.

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REPLY OF PETITIONERS TO THE RETURN OF RESPONDENT.

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e now the petitioners and for their reply to the return of the dent to the rule entered upon him to show cause why a writ damus should not issue against him "to call to his assistance) other federal judges as provided by section 266, as amended, judicial code, being title 28, section 380, United States Code, and determine the motion and prayer of the plaintiff for an cutory injunction," etc., state—

I.

Petitioners deny that there is no motion for an interlocutory ion pending in the court, and deny that the motion for an cutory injunction was not upon the ground of unconstitution-f any statute or order of any administrative board of the f Kansas. Petitioners state that a portion of the applica-on which said injunction was issued is set forth in the peti-r mandamus, and that a copy of such application is attached return marked "Respondent's Exhibit 1."

(*b*) Petitioners state that the motion for an interlocutory injunction, though it did not call for a three-judge court, was of a nature to require a three-judge court. Petitioners admit that no notice had been served upon the governor or attorney-general of Kansas as provided by section 266, as amended, of the judicial code, of the hearing of the motion for an interlocutory injunction. Petitioners deny that the motion of the plaintiff to constitute a three-judge court is no proper part of the record herein.

Petitioners deny that the motion for an interlocutory injunction upon which the respondent made his order for an interlocutory injunction was not upon the ground or basis or upon the consideration of the question of constitutionality or unconstitutionality of any statute of the state of Kansas, or any order of any administrative board of said state, and deny that the making of such order of interlocutory injunction was not upon any such ground or basis.

(*c*) Petitioners state that the copy of the affidavit of J. V. Parker, mentioned in their petition for mandamus (pp. 23, 24), is attached hereto, marked "Appendix M," and made a part of this reply; that there are attached to the original of said affidavit a number of bulky schedules showing fire insurance rates of the plaintiff in the state of Kansas, and which exhibits were presented with said affidavit by the plaintiff to the respondent at said hearing of the motion for an interlocutory injunction, and have been filed by the plaintiff on or about May 21, 1929, in said case with the clerk of the district court. Copies of said schedules are not attached hereto.

Petitioners state that a copy of the affidavit of Charles R. Street, referred to in the petition for mandamus (pp. 23, 24), is attached hereto, marked "Exhibit N," and made a part of this reply, and said affidavit was presented by the plaintiff to the respondent at said hearing of the motion for interlocutory injunction and was filed in said case with the clerk of said court on or about May 21, 1929.

II.

Petitioners deny that there is no provision in the statutes of Kansas empowering the petitioner, Charles F. Hobbs, commissioner of insurance of the state of Kansas, to cancel licenses as a means of enforcement of the rate order complained of in the bill of complaint, and allege that the provisions of the Kansas statutes upon the subject—that is, section 8 of chapter 152, Session Laws of Kansas, 1909 (Appendix H to plaintiff's petition), which section was reënacted as section 40-468, Revised Statutes of Kansas, 1923, and was again reenacted as section 40-918, chapter 231, Session Laws of Kansas, 1927—authorize the commissioner of insurance to revoke the license of a company, its officer or agent, for a violation of statutes of Kansas, including the act for the regulation of fire insurance rates, which now appears as sections 40-911 to 40-923, of chapter 231, Session Laws of Kansas, 1927; and for disobedience to a valid order of the commissioner of insurance upon the subject of fire insurance rates; and section 40-222 of chapter 231, Session Laws of Kansas, 1927 (Appendix J to the petition herein), authorizes the commissioner of insurance to revoke the license of a company on either of the same grounds, and section 40-242, chapter 231, Session Laws of Kansas, 1927 (Appendix K to the petition herein), authorizes the commissioner of insurance to revoke the license of an agent of a fire insurance company on either of the same grounds. Petitioners admit that at the hearing of the motion for said interlocutory injunction it was not shown that the plaintiff was insolvent, or that any condition like insolvency of the plaintiff existed.

Petitioners deny that they have waived and disclaimed reliance upon the provisions of the statutes providing for cancellation of licenses. Petitioners deny that the interlocutory injunction granted by the respondent and the motion therefor were not considered, based upon or granted upon the ground of the unconstitutionality

of a statute of the state of Kansas, and that the interlocutory injunction was not for the purpose of suspending or restraining the enforcement, operation or execution of any statute of the state of Kansas, or the enforcement or execution of an order by an administrative board or commission of the state of Kansas on the ground of unconstitutionality of such statute; and allege that said interlocutory injunction was for the purpose of restraining the enforcement, operation and execution of the fire insurance rate statute of the state of Kansas by restraining the action of Charles F. Hobbs, as commissioner of insurance of the state of Kansas and William A. Smith, as attorney-general of the state of Kansas, in the enforcement and execution of such statute and in the enforcement and execution of the rate order in question, referred to in the petition in this suit, under and pursuant to the statutes of Kansas, including said rate regulation act; and allege that such order was made by an administrative board or commission of the state, acting under or in pursuance to the statutes of such state.

III.

Petitioners admit and state that the motion of plaintiff for an interlocutory injunction and to constitute and assemble a court of three judges, dated April 11, 1928 (appendix C to the petition herein) was withdrawn by the plaintiff by oral statement before the respondent at the hearing before him on May 10, 1929, referred to in paragraph 14, pages 22, 23 of the petition, and admit that the motion for an interlocutory injunction filed on May 11, 1929 (exhibit I to respondent's return, pages 12, 13), was the only motion for an interlocutory injunction presented by the plaintiff to the respondent. Petitioners deny that said motion did not appear to challenge the constitutionality of any statute of the state of Kansas or any order of the commissioner of insurance, and admit that no

notice of the hearing of such motion had been served upon the governor, but state that a notice of the hearing of such notice had been served upon the attorney-general. Petitioners deny that the plaintiff stated that it did not intend to press its prayer for an interlocutory injunction contained in its bill of complaint; but admit and state that at said hearing of May 10, 1929, the plaintiff stated that it would not then present the prayer in its bill of complaint for an interlocutory injunction. Petitioners deny that the motion for an interlocutory injunction filed on May 16, 1929, was limited to an application to restrain the commissioner of insurance from canceling the license of the plaintiff and of its agents. Petitioners deny that the matter involved but one question, and that is the construction of the rate-regulating statute; and deny that the plaintiff conceded for the purpose of the motion, the constitutionality of the rate-making statute. Petitioners state that section 40-918, chapter 231, Session Laws of Kansas, 1927, which corresponds with section 8, chapter 152, Session Laws of Kansas, 1909 (appendix H to the petition, pages 175, 177), authorizes the commissioner of insurance to revoke the license of a company if it has violated any provision of the rate-regulating statute. Petitioners deny that there was any issue in said case in the district court or any question there presented of a revocation of the license of the plaintiff because the plaintiff sought a judicial review in court of said rate order; and state that the motion of the plaintiff for an interlocutory injunction filed on May 16, 1929 (respondent's exhibit 1, page 12 of return), taken in connection with the bill of complaint of the plaintiff, shows the purpose of said motion, and that the said motion for an interlocutory injunction was as stated therein, "because of any supposed violation of the said rate order aforesaid, and the terms thereof." Petitioners deny that the enforcement of the rate order has not been restrained.

IV.

Petitioners allege that a notice of the hearing of said motion for an interlocutory injunction had been served upon the attorney-general of the state of Kansas, who was represented at said hearing by his attorneys. Petitioners admit that the respondent could deny the motion if the proper notices were not given or waived; and allege that upon such motion being presented to the respondent it was his duty to require that notices under the statute should be given to the governor and attorney-general of the hearing of such application for an interlocutory injunction before three judges, and to assemble a court of three judges to hear such motion. Petitioners deny that there is not now and there was not at the time of the presentation of the motion of the plaintiff on May 18, 1929, pending before this respondent any motion in which the jurisdictional requirements of section 266 permitted the assembling of a three judge court.

V.

Petitioners admit that the order for injunction of May 18, 1929 (appendix F, page 72, to the petition herein), did not restrain or enjoin said Charles F. Hobbs, his attorneys and agents, from canceling the license of the plaintiff to do business in the state of Kansas, and from canceling the licenses of plaintiff's agents, on the ground of insolvency of the plaintiff, and state that such order was upon the ground of "any supposed violation by plaintiff of the rate order made by the superintendent of insurance of Kansas, issued January 20, 1922, effective March 1, 1922." Petitioners deny that the statutes of Kansas make no provision for the cancellation of a license of a company or its agents as a means of enforcing a rate order.

VI.

Petitioners deny that they have an adequate remedy by appeal in the matters presented in the petition, or referred to in the re-

turn. Petitioners deny that the motion of the plaintiff for an interlocutory injunction upon which the interlocutory injunction of May 18, 1929, was made, was not an application by the plaintiff under section 266 of the judicial code, as amended, for an interlocutory injunction upon the ground of unconstitutionality of a statute of Kansas, and deny that it was not an application to restrain the enforcement or execution of a statute or order of an administrative board or commission acting under or pursuant to a statute asserted to be unconstitutional. Petitioners state that the alleged causes of action of the plaintiff were set forth in his bill of complaint, a copy of which is attached to the petition herein and made a part hereof (appendix B, pages 39-94, to the petition herein). Petitioners admit that the only motion for an interlocutory injunction before the court is set forth as respondent's exhibit I, and state that such motion must be taken in connection with the allegations and prayer in the bill of complaint of the plaintiff. Petitioners deny that the respondent has exhausted the power invoked by the said motion of the plaintiff for an interlocutory injunction by granting said interlocutory injunction, and deny that there is nothing before said respondent and the court requiring the consideration of the respondent, or of three judges. Petitioners deny that mandamus in this case does not lie after notice of the application for the interlocutory injunction and the ruling or order thereupon.

VII.

Petitioners deny that they have waived the right to a writ of mandamus in the premises. Petitioners deny that the first motion of the plaintiff for an interlocutory injunction was abandoned because of a pledge made by the petitioners in open court, and by them continued, pledging themselves to take no action on the subject of injunction, and to permit no action which would be the subject of injunctional restraint; admit that on account of the pro-

ceedings before the respondent set forth in paragraph 4, pages 13-15 of the petition herein, and including the order of said court of April 3, 1928, the plaintiff did not press or present for a hearing its motion for an interlocutory injunction as first filed upon April 11, 1928; deny that while said pledge of the petitioners was in effect, the plaintiff was barred from applying for an interlocutory injunction; but admit that while such pledge was in effect the plaintiff was justified in not applying for an interlocutory injunction, because it could rely upon said pledge until it was revoked. Said pledge upon its face was subject to revocation by the petitioners giving notice to the plaintiff or its counsel of its intention so to do in ample time so the plaintiff might resort to the court for an appropriate order. Petitioners deny that they permitted a reference to a special master in chancery of any of the questions in said case, and state that they neither consented or objected to such reference. Petitioners deny that they permitted an order for the taking of depositions in said case, but admit they consented thereto. Petitioners deny that either by said pledge or any other action, or an action of any kind, that they have constituted the respondent as a sole judge to hear said cause, and that they waived any process of the law for their benefit respecting the institution of a statutory three-judge court. Petitioners deny that their withdrawal of their pledge, set out in the order of April 3, 1928, was a pretended withdrawal; but allege that it was an actual withdrawal; and deny that it was resorted to as a mere device of the petitioners, and state that it was an assertion to their rights to the assembling of a three-judge court to hear the motion for interlocutory injunction and to act at the final hearing of said case, which right was reserved in said order of April 3, 1928; and deny that they have no right under the circumstances to insist upon the assembling of a three-judge court for said purposes.

VIII.

Petitioners admit that the bill of complaint in said case, and the other cases referred to in the petition, contain allegations of diversity of citizenship in addition to allegations charging unconstitutionality of the statute and of the order; and deny that the fact that an interlocutory injunction was asked and granted does not of necessity involve determination of any constitutional questions under the federal constitution, or necessarily require a statutory three-judge court, or necessarily involve an appeal to the supreme court.

IX.

Petitioners deny that the interlocutory injunction which was granted by the order of the court of May 18, 1929, was incidental to the controversy, and state it was a substantial part of the controversy, and deny that the plaintiff did not seek any action restraining the petitioners from enforcing the rate order, and deny that the plaintiff represented that the petitioners were threatening to defeat the jurisdiction of the court by canceling its licenses, and deny that said interlocutory injunction was granted in order to protect the jurisdiction of the court, and without any constitutional claim being drawn into the question, and deny that the plaintiff has presented any question of a revocation of the licenses by the petitioners on the ground that the action was brought in the United States district court to test the rate order; and allege that said interlocutory injunction of May 18, 1929, was granted by the court under the motion of the plaintiff (respondent's exhibit I, page 12 of the return), and under the allegations of the bill of complaint setting forth alleged violations by the rate statute and the order of the commissioner of insurance in question of provisions in the Fourteenth Amendment to the constitution of the United States.

The allegations and denials of this reply relate both to the case of the Agricultural Insurance Company and also to each of the one hundred forty-nine other similar cases in the district court, referred to in our petition, and designated in appendix A to the petition.

WHEREFORE, Petitioners repeat their prayer set out in their petition herein.

CHARLES F. HOBBS,
Commissioner of Insurance of the State of Kansas,
and
WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
Petitioners.

By WILLIAM A. SMITH,
Attorney-general of the State of Kansas.
JOHN G. EGAN,
Asst. Attorney-general of the State of Kansas,
JOHN F. RHODES,
Their Attorneys.

APPENDIX M.

(Title of Cause Omitted.)

AFFIDAVIT.

STATE OF ILLINOIS, COUNTY OF COOK, ss.

J. V. PARKER, being first duly sworn, upon his oath says:

I am an actuary and am familiar with the rates charged by fire insurance companies in Kansas, the general schedules under which they make and apply their rates, and have acted in a consulting capacity for insurance companies respecting the same for many years past. The attached schedules are general schedules in force in the state of Kansas at the time of the making of the rate order of the superintendent of insurance of Kansas, made on January 20, 1922, set forth in the bill of complaint. The making of rates at such time, and for many years prior to that time and since has been made under filings made and approved by the Insurance Department of the state of Kansas in which the charge upon the various hazards was predicated upon the elements of structure, exposure, inflammability and damageability of contents, and protection. These are analyzed by inspection of structures and at no time have rates been made upon risks such as mercantile risks, manufacturing plants, or other classes of risks on which rate changes are ordered in said rate order by affixing said rates by vocational class names as recited in such rate order. The effect of making changes by such classifications is impractical and impossible of application and creative of discrimination. By application of general schedules in use a differing charge would be made to one establishment styling itself a wholesale grocery which had a printing plant for printing its labels, and carried a stock of inflammable oils, as compared with another concern which might be styled a wholesale grocery having no such activities.

Rates are made and adjusted through the state of Kansas, and have always been for fifteen or twenty years past, by comparison of fire hazards in risks and not by their vocational names. The classifications made in the rate order were available to the superintendent for only a period of three years before the date of his rate order, which is an entirely inadequate period for which to gather any

statistics as to such minute classes, and the number of risks and amounts involved in many of them are so small that no reasonable judgment about them could be formed, even over a much longer period.

I am the publisher of the book known as Analytic System, under which a scientific method is established for ascertaining the hazard inhering in various risks in a state. Such publication was adopted and filed in the state of Kansas and was employed with the approval and consent of the state of Kansas, and is still employed there. The classification undertaken in the rate order is, in my judgment and opinion, entirely destructive of the scientific analysis of rate hazard, and the style of risks by their vocational names as employed in the rate order is productive of discriminations and absurd conclusions so that in a great number of the supposed classifications in the rate order mentioned where increases are directed, a profit is shown for the period before and after the rate order during which such records were kept for Kansas, which keeping of records was commenced about 1918; and the groups on which reductions were ordered, frequent cases disclose a heavy loss entirely irrespective of the rate reduction ordered on them.

It is my judgment that said classes are so small that they are so regardless of the hazards and risks involved that results measured by such classifications are accidental, with no likelihood of any experience taken for any period of time being reproduced in the future except as it might result from sheer accident.

J. V. PARKER.

Subscribed and sworn to before me this — day of May, A. D. 1929.

(Seal.) LAURETTA A. GAUGER, *Notary Public.*

(Copies of the schedules referred to are very bulky and are not here attached.)

APPENDIX N.

(Title of Cause Omitted.)

AFFIDAVIT.

STATE OF ILLINOIS, COUNTY OF COOK, ss.

CHARLES R. STREET, being duly sworn, upon his oath says:

I am vice president of the Great American Insurance Company and vice president of American Alliance Insurance Company, both of which are fire insurance companies doing a general business of insurance against fire, windstorm, and all lines generally conducted by companies of that kind. I have held executive offices with fire insurance companies for many years, and have been engaged in such business for about forty years past. I am familiar with the practice of insurance companies during that period, not only the companies with which I have been associated, but also the general practice of companies engaged in the business of fire insurance.

As far back as my personal experience goes (and for many years before that, according to my general knowledge of the business), fire insurance companies doing business in the United States have universally made their calculations for their own purposes and information, and in stating the results of their operations in the various states, as respects profit or loss derived on their business of underwriting or insurance during any specified period, upon the basis of earned premiums as income and incurred losses and incurred expenses as outgo. (The term "insurance" and the term "underwriting" are exact equivalents and are so understood in the business, and the operation of the business of insurance as conducted in Kansas and elsewhere is styled "underwriting.")

During all my experience of more than forty years the ascertainment of a balance, as between written premiums (sometimes called "premiums received") and paid losses and expenses has been styled "trade balance," and such calculation is never used for the purpose of ascertaining profit or loss for a given period of time. It is generally recognized by those engaged in the business of fire insurance, that such trade balance when ascertained does not disclose a profit or loss, and is inaccurately and misleadingly used if the balance so remaining is called or treated as a profit or loss.

The terms herein employed are properly defined as the same are used and employed by all persons engaged in or connected with such business, as follows:

"Written premiums" during a period of time are the premiums stipulated in all the policies issued during such period, no matter how far into the future such policies extend.

"Earned premiums" as respects the policies of a given company for a specified period of time, is that part of the premiums of all policies in force during any part of such period as pays for insurance during such period. The premium on a policy partly within and partly without the period under calculation is prorated, and a *pro rata* of the premium is taken into account, in the proportion that such part of the policy term within the period bears to the whole term of the policy.

"Unearned premium" is that part of the premiums stipulated in policies in force during the term under calculation which pays for indemnity after the term under calculation, namely, which pays for insurance for the future.

"Incurred losses" respecting a period of time are those losses from perils insured against which happen, and liability for which becomes fixed, during that period of time upon risks insured against.

"Incurred expenses" are expenses for which liability becomes fixed during the period under calculation.

"Paid losses" are the losses which are paid during a given period, although they may not arise upon policies in force during the period under calculation, and although liability may have previously become fixed, and not taking into account any losses for which liability is fixed if they happen to be unpaid.

"Paid expenses" are those expenses which are paid during the period in question, although the liability for them may have become fixed during a precedent period; not taking into account expenses for which liability exists but which have not in fact been paid.

In my judgment (and it is the judgment universally held by those engaged in the business of fire insurance and who have studied the subject) the experience of a fire insurance company to ascertain its profit or loss for a period of time cannot be soundly computed by adoption of any basis except that of earned premiums as income, and incurred losses and expenses as outgo. The reasons supporting such judgment are as follows:

(*a*) Such is the uniform of companies and company accountants for their own purposes of profit and loss calculations, and is

universally recognized and employed as the sound method of calculation by companies in their own affairs.

(*b*) Such basis is adopted in the annual statement blanks prescribed by the Insurance Departments of every state in the United States, which (at page 10 of Kansas annual statement blanks) require the companies to set forth their insurance or underwriting experience for an elapsed year upon the bases of earned premiums, incurred losses and incurred expenses. This is the only profit and loss calculation prescribed in such report, showing the profit or loss of each company in its nation-wide business for the elapsed year.

(*c*) The basis of earned premiums, incurred losses and expenses is prescribed by the congress of the United States as the method to be used in ascertaining and reporting the profits of insurance companies upon which they shall pay income taxes; and the definition of the act of congress is in accord with the practice of the companies and the standard prescribed in the annual statement blanks prepared by the Insurance Department of Kansas and other states.

(*d*) The statutes of many states, including Kansas, expressly prohibit an insurance company from paying dividends out of the unearned portion of its premiums. The company is permitted to declare and pay dividends only out of surplus profits. Surplus profits are arrived at by offsetting the company's liabilities against its assets; and among the liabilities so offset are included its unearned premiums. It is, in my judgment, inherently illogical to say that unearned premiums are profits, or shall be treated as accrued income when by statute the company is forbidden to distribute such unearned premiums among its stockholders. It is a contradiction in terms to denominate as a profit that which cannot be distributed as a profit.

(*e*) After two years of consideration of this subject by experts representing the fire insurance companies on the one hand through a committee, and the insurance commissioners of the various states of the United States, through a committee representing the public, the Insurance Commissioners Convention (which is a voluntary association to which the insurance commissioners of every state in the Union, including Kansas, belong) the basis of earned premiums and incurred losses and expenses as the proper and uniform method to be used in calculating profit or loss. The report of the committee of the National Convention of Insurance

Commissioners was approved and adopted by the convention on December 7, 1921. Among other things that report states:

"Underwriting profit (or loss) is arrived at by deducting from earned premiums all incurred loss and incurred expenses.

"No part of the so-called banking profit (or loss) should be considered in arriving at the underwriting profit (or loss)."

In such report, it was further found that:

"A reasonable underwriting profit is 5 per cent, plus 3 per cent for conflagrations."

The foregoing conclusions were adopted by the convention accompanied by the statement that it was "highly important that this body clearly express its convictions as to what constitutes a reasonable underwriting profit and a proper and uniform method of arriving at the same."

(*f*) If the matter were one of first impression as to what is a sound method of ascertaining profit or loss, the earned and incurred method would, in my judgment, necessarily be adopted, because it is a sound method of accountancy. It is not in principle any different from principles of accountancy applied in other lines of business. If money be paid in advance for service or goods or indemnity, and a part of that which is to be delivered has in fact been delivered at a specified date, and a portion is to be delivered in the future, sound accountancy and common honesty requires that the money so paid in advance be not all treated as income when a liability for performance remains for the future. The amount or value of the future liability remaining must be set up for the unperformed or undelivered portion of the contract, otherwise the statement made is a false one.

These principles specially apply to a policy of insurance, because, in every policy issued by fire insurance companies throughout the United States there is uniformly a provision that the policy may be canceled at any time, either by the insurance company or the person insured, and it is palpably illogical to treat as profit or accrued income that part of the premium which has not been earned, and which may never become earned, but which the company may be compelled to return to the policyholder on cancellation.

A sound method of apportioning that part of the premium applicable to a past period and assigning another part to a future period, where performance is to be made through a given period of time, is to take that portion of time which has elapsed and ascertain its proportion to the whole period of time stipulated in

the insurance contract. That proportion of the stipulated premium represents the amount earned at a specified time. The proportion which is prepaid or advanced, paying for future service or indemnity, is the unearned portion. The proportion as between earned and unearned premium is prorated properly and soundly according to the proportion of the policy term within and without the test period under calculation.

In no other way can the experience of any given period of time, such as a five-year period, be segregated. If the profit or loss of a company for a given year or a given number of years is to be ascertained, no other method will disclose or even fairly indicate the profit or loss for the period.

(*g*) There is an element of marked error in resorting to the "received and paid" method, namely, by taking into account written premiums (sometimes loosely styled premiums received) as income and paid losses and expenses as outgo. The fire insurance companies doing business in Kansas universally write a considerable volume of policies for three and five years, as well as for one year. This is common practice throughout the United States. If all the written premiums be taken into account for a one-year period ending December 31, 1927, then on all three-year policies written in 1927 there would still be indemnity to be furnished during the years 1928, 1929 and 1930. For five-year policies it would extend into 1931 and 1932. In taking the experience for one year, taking into account premiums written only during that year, there would be taken into account as income, premiums paying for insurance extending over five years of time against which would be set up losses and expenses paid during 1927.

(*h*) The only way of setting up operating income for a period of say, five years, against outgo of the same five years, is to set up the losses and expenses which happened on the policies in force, and for which liability became fixed during those five years, and to take into account only the earned premiums, that is, the premiums which pay for insurance during that period. Under the earned method calculation, policies written during a prior period than that under calculation, are taken into account in so far as they extend into the period under calculation.

It is my opinion that it is the consensus of opinion among persons engaged in the business of fire insurance, who have given any consideration to the subject, that a reasonable standard of profit measurement is 10 per cent upon the earned premiums. This standard, which is generally accepted in the insurance field, has been limited

by the Insurance Commissioners Convention to 8 per cent, of which 5 per cent is styled a profit and 3 per cent an allowance for conflagration losses. Whichever method may be the more advisable, it is important to understand that such measure is in no way a guaranteed profit, nor necessarily any profit at all. Its employment merely means that applying such measure to the past experience there is no unreasonable profit to be anticipated in the future. The business of fire insurance is an extremely hazardous one, and if, upon a given level of rates a serious loss occurs, there is no means of recouping such loss.

There is such sharp competition with mutual insurance companies, reciprocal insurance companies, Lloyds and other individual insurers and other stock companies writing similar lines of insurance, and such competition among stock fire insurance companies themselves, that no likelihood exists, in my judgment, for exorbitant charges, even if no regulation of any kind existed. The companies in general are doing business at a very narrow margin, so narrow that any unexpected and unusual loss in any state will operate to deprive the companies there of any profit over any period of time.

It is true that a large number of old and well-established fire insurance companies have corporate earnings enabling them to pay reasonable dividends to their stockholders, even though they may not make anything on their business of insurance in Kansas. It is to be borne in mind that such profit-making companies, almost without exception, are those companies which have been engaged in business for fifty or a hundred years and have accumulated very large reserves, which they have retained for investment instead of distributing the same to the stockholders, as they might have done, and do business in other states and countries where they make a profit. These profits may have been derived in some part from insurance, and in some part from compounding their capital and surplus, investing and reinvesting the earnings upon it, so that in many cases the surplus has been developed into a figure in excess of the original contributions to stockholders. These earnings so derived from investments and insurance conducted elsewhere are distinct from and not involved in the business of insurance in the state of Kansas, nor have they, during any of the past ten or fifteen years and more, been derived in any part from Kansas business, except in case of a few companies unusually fortunate or restricting their business to specified classes.

It is neither practical nor possible to make any profit calculation upon the basis of capital, as is done in case of railroads and public utility companies, because the business is fundamentally different in its nature. Any calculation of profit and a reasonable return must be upon the basis of a reasonable charge for the service and indemnity rendered, which, as I have already said, should be upon the basis of 10 per cent upon earned premiums; and it may readily happen that when so calculated, by reason of the hazards of the business, no profit whatever will be derived from the business when and as conducted pursuant to such basis.

The reason that no profit in any amount necessarily results from application of such basis of calculation is because the risks assumed are in general one hundred times the premium, and in some cases, even more, so it can readily occur that losses may and often do happen that defeat all effort at prior calculation. No calculation upon the basis of capital used or useful in the business is possible, for many obvious reasons, among others:

Many companies are engaged in the business, which companies are foreign to the United States and organized under the laws of other countries. Such companies make a deposit of $200,000 in the state of New York and receive remittances from their home office or send remittances to them as their business proceeds. American companies may have capital of from $200,000 to many millions of dollars. Some do business in only a few states, others in all states in the Union, and still others worldwide. Two companies, doing an equal volume of business in the state of Kansas, may in one case have a capital of $200,000 and in another case of $10,000,000. As neither company has its capital invested in the state, in the sense that utilities and railroads do, it is apparent that no theory of allocation of the capital is practical or possible. The observations herein made as to a proper basis of profit computation are probably not highly material upon the hearing now being had, because the companies here suing have made no profit at all or a purely nominal one which the rate orders would entirely destroy.

Stock fire insurance companies doing business in Kansas each and all have two distinct activities in which they are engaged—first, that of insurance or underwriting as operated in Kansas, and second, that of investment of their moneys conducted at their home offices. The latter department of activity is sometimes referred to as their banking or investment department. In the case of the

larger stock fire insurance companies, these departments are carried on with complete independence, having one or more executive officers in charge of investments, with a separate staff of employees. The investment department is charged with rents, salaries of employees and executive salaries independent of the operation of the insurance department of the business. In the case of smaller companies, the activities are also carried on independently, except that the president of the company will in such cases usually buy and sell securities under direction of the board of directors, and the time spent by him on such features of the business is a comparatively inconsequential part of his time. The expense is kept strictly separate in case of such companies also. The directors who take the responsibility on such matters customarily serve without compensation or for a nominal compensation, and are men of business experience in different lines of industry, who lend their experience to the investment problems of the company.

Fire insurance companies are required by law and by the nature of the business to keep their capital out of the business of insurance and keep it as a fund in the nature of a guarantee fund. The moment it is employed in the business of insurance the company is insolvent. The capital must be kept intact and not used for salaries, rents, loss payments, etc. If even a dollar of it is so used, the company is impaired and insolvent and prevented from doing business. In this respect fire insurance differs from most lines of business. In some other kinds of business the capital is employed in the business and invested in tangible assets and not required by law to be kept out of the business. The free or distributable surplus of fire insurance companies, commonly called "surplus" is a sum in excess of capital and in excess of all liabilities, such as reserves for unearned premiums, loss payments, etc. This fund is also free from the burdens of the business and not mingled with the operations of the business of insurance. It may be borrowed to set up reserves or make up losses in the business, and when so used it is taken out of and ceases to be free surplus.

It is therefore just to say that both capital and free surplus are entirely distinct from the operations of the business of insurance; and if the companies should cease doing business of insurance, they would have their entire capital and free surplus available to lend out at interest, without taking any of the hazards of the business of insurance. The relation of these funds to the business of insurance

is, in substance, that of a guarantee fund, which guarantees that resources exist to which resort may be had if necessary, to meet unfortunate losses.

The investment of capital and surplus of all the plaintiff companies in the present suits (except as to those incorporated in Kansas), in every case is done at the home offices of the companies in other states, and not in the state of Kansas.

CHARLES R. STREET.

Subscribed and sworn to before me this 15th day of May, 1929.

(Seal.) LAURETTA A. GAUGER, *Notary Public.*

FILE COPY

OCT 14 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States.

No. 20 Original—October Term, 1929.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the HONORABLE JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

REPLY BRIEF OF PETITIONERS

ON THEIR—

(a) Application for Leave to File a Reply to the Return;
(b) Application for Appointment of a Commissioner to Take Evidence.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Asst. Attorney-general of the State of Kansas,
JOHN F. RHODES,
Attorneys for Petitioners.

13-1462

In the Supreme Court of the United States.

No. 20 Original—October Term, 1929.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the HONORABLE JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

REPLY BRIEF OF PETITIONERS

ON THEIR—

(a) Application for Leave to File a Reply to the Return;
(b) Application for Appointment of a Commissioner to Take Evidence.

STATEMENT.

At page 36 of the brief of respondent in support of the return, the attorneys on which brief are also attorneys for the insurance companies in the one hundred fifty cases referred to in the petition, it is charged that the petitioners were careless in not calling to the attention of the court, in their motion for leave to file a reply, to the fact that the motion for an interlocutory injunction, upon which the interlocutory injunction was granted, was not the motion of the insurance companies filed April 11, 1928, or that the petitioners were willing that the court should fall into error in the matter. In the brief of respondent in opposition to the application of petitioners for leave to file a reply to the return and to the application for

petitioners for the appointment of a commissioner to take evidence (pp. 13, 17, 20, 21), it is charged, in substance, that the petitioners attempted to mislead the court by not showing to it upon their petition that the first motion of the insurance companies for an interlocutory injunction, which was filed April 3, 1928, had been withdrawn.

These charges are an attempt to create a diversion from the issues in the case.

They are without foundation in fact.

The petition shows plainly that the motion of the insurance companies for an interlocutory injunction upon which the interlocutory injunction was granted by the respondent May 18, 1929, the day that motion was presented to the respondent as district judge, is a different motion from that of the insurance companies for three judges and an interlocutory injunction which was filed April 11, 1928. The body of the motion of April 11, 1928, is set out as Appendix C, p. 95 of the petition. It covers about six and one-half lines, and the greater part of it consists of a request that the district court constitute and assemble a court of three judges to consider the application of the plaintiff for an interlocutory injunction, and it closes with the brief request that the court (meaning a court of three judges) should grant the plaintiff an interlocutory injunction as prayed for in the bill of complaint.

As the greater part of this motion was upon the matter of a court of three judges being constituted and hearing the application for an interlocutory injunction, it was properly referred to at page 22 of the petition as a "motion for the assembling of a court of three judges to hear its application for an interlocutory injunction." The context in paragraph XIV, pages 22 and 23, shows that the meaning of that reference was to the entire motion.

In paragraph XV, pages 23 and 24, a portion of the second motion

for an interlocutory injunction, and upon which the interlocutory injunction was granted May 18, 1929, is set out expressly as a portion, and contains seventeen full lines and two lines of about three-quarters length each. This motion refers to the written notice served by the defendants upon the plaintiff that they would proceed to enforce the rate order, and it contains statements which do not appear in the first motion.

In paragraph XII, page 21 of the petition, it is stated that on May 6, 1929, the defendant served upon the plaintiff that notice. It is obvious from the face of the petition, therefore, that the motion presented to the court on May 18, 1929, by the insurance companies was not the motion filed by them April 11, 1928, and it is also obvious on the face of the petition that it was this second motion that was presented to the district judge upon May 18, 1929, and upon which he granted the interlocutory injunction.

On the objection made by respondent to the conclusions of law contained in the reply, we think it is sufficient to say that the return contains a number of conclusions of law, and as respondent saw fit to use them in his return, the petitioners controverting them have a right in the form of reply submitted to deny such conclusions of law contained in the return and to make statements of conclusions of law to counter those contained in the return.

Respectfully submitted,

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,

JOHN G. EGAN,
Asst. Attorney-general of the State of Kansas,

JOHN F. RHODES,
Attorneys for Petitioners.

□

13-1462

FILE COPY

Office Supreme Court, U. S.
FILED
SEP 25 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
of the United States.

October Term, 1929—No. 20, Original.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

BRIEF OF PETITIONERS

In Support of Their Motion for Leave to File a Reply to the Return of the Respondent.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas.
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas.
JOHN F. RHODES,
Attorneys for Petitioners.

13-1179

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In the Supreme Court of the United States.

October Term, 1929—No. 20, Original.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

BRIEF OF PETITIONERS

In Support of Their Motion for Leave to File a Reply to the Return of the Respondent.

STATEMENT.

Some of the allegations contained in the petition are not denied by the return of the respondent to the rule to show cause why a writ of mandamus should not be allowed directed to the respondent. Some of the allegations are, however, denied, and there are allegations of new matter in the return which the petitioners desire to meet by a reply.

It is stated in rule No. 5 of the court, as follows:

"This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court in matters not covered by its rules or decisions, or the laws of Congress."

POINTS AND AUTHORITIES.

The ancient common law rule that a traverse to a return was not permitted in mandamus.

Tapping on Mandamus, p. 383 (p. 422 American Edition of 1853).

The reversal of the ancient rule by statute.

Statute of 9th Anne, chapter 20.
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A reply may be filed traversing allegations of fact in the return to a rule to show cause or to an alternative writ of mandamus.

State of Florida v. State of Georgia, 17 Howard 478, 493; 15 L. ed. 181.
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Merrill on Mandamus, sections 268, 288, 289.

ARGUMENT.

This court will follow the ancient English practice under this rule of court only so far as it will effectuate the ends of justice, and if it fails to do so will adopt its own rule for the purpose.

State of Florida v. State of Georgia, 17 Howard 478, 493; 15 L. ed. 181.

State of California v. Southern Pacific R. Co., 157 U. S. 229, 249; 39 L. ed. 683.

It was the ancient English rule at common law that no traverse to a return in mandamus was allowed, but if the relator was injured by a return false in fact he had an action on the case for a false return. If the relator recovered in such action then a peremptory writ of mandamus would issue.

Tapping on Mandamus, 383, p. 422, American edition of 1853.

The old rule was dilatory, impracticable and unjust at least as applied to later conditions.

By the Statute of 9th Anne, chapter 20 (extract from printed at p. 472, appendix to Tapping on Mandamus, American edition of 1853), it was provided that a person suing out a writ of mandamus could plead to or traverse all or any of the material facts contained within the return to the writ. That statute was addressed to the trial of the rights to corporate offices or franchises.

By the Statute of 1st William IV, chapter 21 (extract from printed in Tapping on Mandamus, *id.*, p. 481), the provisions of the Statute of Anne were extended and made applicable to all other writs of mandamus, and the proceedings thereon, except so far as they might be varied or altered by the later statute. It authorized the raising of issues of fact or law by traverse to the return to the writ.

In *Ex parte Newman*, 14 Wallace 152, 166, 20 L. ed. 877, where a rule to show cause why a peremptory writ of mandamus should not be granted was issued by the supreme court to a United States circuit judge, this court stated: "Matters charged in the rule and denied by the respondent must be proved by the relator, and matters alleged in avoidance of the charge made, if denied by the relator, must be proved by the respondent."

This quotation implies that the relator would have a right to deny by a reply allegations in the return.

In *United States v. Boutwell*, 17 Wall. (84 U. S.) 604, 608, 609, 21 L. ed. 721, the mandamus action was begun in the supreme court of the District of Columbia. This court said that by the Statute of 9th Anne, chapter 20, section 1, mandamus became in effect a personal action against the defendant.

It follows from that statement that the ordinary rules as to making an issue in personal actions by means of a reply should apply here.

In *United States v. Schurz*, 12 Otto (102 U. S.) 378, 392, which was begun in the supreme court of the District of Columbia, 26 L. ed. 167, 170, it was stated,

"Some question was made, on the argument in this court, as to the effect of the answer as evidence, and the practice in the Court of King's Bench, in England, has been referred to as making the return to the writ conclusive, or at least evidence, of all it states. We are relieved of any difficulty on this point by the stipulation of the parties.

"No writ of mandamus, alternative or otherwise, was issued. And there was, therefore, no technical return to such a writ, and in strictness the rule applicable to such a writ does not apply. If, however, it could be held that the answer to the rule to show cause stands in the place of a return to a writ of mandamus, the parties have voluntarily made their own issues, and stipulated as to the evidence which shall be considered by the court."

In the pending case no alternative writ of mandamus was issued. A rule to show cause was issued, and the ancient rule prior to the Statute of 9th Anne, chapter 20, in England, as to the conclusive effect of the answer on points of fact, does not apply.

In *Ex parte Rowland,* 14 Otto (104 U. S.) 604, 615; 26 L. ed. 861, on a petition for a writ of habeas corpus, there was considered by the court a mandamus proceeding in the United States circuit court in Alabama. It was said,

"We proceed now to the consideration of the return of the commissioners to the rule upon them to show cause why they should not be attached for disregarding the writ. Their statements in the return have not been controverted, and are, consequently, to be taken as true. While the return to the mandamus itself was quashed, the return to the rule stands in the place of a return to the writ for all the purposes of this proceeding."

This statement implies that a reply could have been filed controverting the allegations in the return.

In *United States, ex rel. Turner, v. Fisher,* 222 U. S. 204, 209, 56 L. ed. 165, the mandamus action was begun in the supreme court of the District of Columbia. This court stated,

"Where a general demurrer to an answer containing such defense was overruled, and the relators, instead of replying, elected to stand on their demurrer, the writ of mandamus was properly refused."

This implies that a reply might have been filed.

On the same point, see *Work v. United States, ex rel. Rives,* 267 U. S. 175, 184, 185, 69 L. ed. 561.

In order to enable this case to be determined upon the facts, it is necessary that a reply be filed raising issues upon certain allegations in the return. It is a well-established practice in the courts of this country that a traverse to the return to an alternative writ of mandamus, or a rule to show cause why a writ should not be issued, may be filed.

Merrill on Mandamus, sections 268, 288, 289.

We submit that it is plain from the quotations from the opinions of this court which we have given that it is proper that such reply should be filed.

Respectfully submitted,

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas,
JOHN F. RHODES,
Attorneys for Petitioners.

□

13-1179

FILE COPY

Office Supreme Court, U.
FILED
SEP 25 1929
CHARLES ELMORE CROPL
CLERK

In the Supreme Court

of the United States.

October Term, 1929—No. 20, Original.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

MOTION OF PETITIONERS FOR THE APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

BRIEF OF PETITIONERS ON THEIR MOTION FOR THE APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas.
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas.
JOHN F. RHODES,
Attorneys for Petitioners.

13-1178

In the Supreme Court of the United States.

October Term, 1929—No. 20, Original.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

MOTION OF PETITIONERS FOR THE APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

Come now petitioners in the above-entitled case and move the court to appoint a commissioner to take evidence and return the same to this court, on behalf of petitioners, and also on behalf of respondent if he should so desire, on some issues presented by the petition, the return of the respondent and by the reply. A brief is submitted in support of this motion.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas.
JOHN F. RHODES,
Attorneys for Petitioners.

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In the Supreme Court of the United States.

October Term, 1929—No. 20, Original.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

BRIEF OF PETITIONERS ON THEIR MOTION FOR THE APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

The petitioners have presented a motion for the appointment of a commissioner to take evidence upon some issues raised by the return of respondent, and also by the reply of petitioners in the above case.

They desire to show by evidence the following points:

The affidavits of J. V. Parker and Charles R. Street, which were presented to the respondent judge by the attorneys for the insurance companies in the 150 cases referred to in the petition, at the hearing when the interlocutory injunction was granted by the respondent judge, and which affidavits were thereafter filed with the clerk of said court. These affidavits are referred to at pages 23 and 24 of the petition and at page 3 of the return of respondent. Copies, omitting certain rate schedules, are attached to the reply which we have prayed leave to file. That such affidavits were presented at that hearing is admitted in the return, and it is there asserted that they disclosed adequate ground for an interlocutory injunction without regard to any question of unconstitutionality of any statute

or order of any administrative board of the state of Kansas. The petition states that in the affidavit of J. V. Parker, he stated he was an actuary and was familiar with the rates charged by fire insurance companies in Kansas, and that his affidavit treated of the making of fire insurance rates and the classification of such rates; and that the affidavit of Charles R. Street stated that he was vice president of two insurance companies which did a fire insurance business, and he treated the subject of profits and the conduct of fire insurance business. Our contention is that these affidavits are both on the question of the adequacy and constitutionality of the rates fixed by the order in question of the former superintendent of insurance of Kansas.

The petitioners desire to show by evidence that on April 3, 1928, when an order was made in said cases in the district court and soon after the filing of the suits, in what we refer to as the Kansas cases, many similar suits were pending in the United States district court in Missouri by fire insurance companies as plaintiffs, herein referred to as the Missouri cases, and that many of the plaintiffs therein were also plaintiffs in the Kansas cases; that in the Missouri cases the plaintiffs applied for interlocutory injunctions; that a hearing was had before three judges in the latter part of April, 1928, and a decision rendered by them on the question of the interlocutory injunctions in April, 1929; that on April 3, 1928, there was a conversation between the attorneys for opposite parties in the Kansas cases, in which they concurred in the view that it would be desirable to defer a hearing in the Kansas cases until the decision by the three judges on the applications for interlocutory injunctions in the Missouri cases. There are allegations on this subject in paragraph VI, pages 15, 16 and 17 of the petition, and a denial in subdivision *e*, page 3, of the return.

Petitioners desire to show by evidence that at the hearing when the special master in chancery was appointed by the district judge,

upon May 10, 1929, the attorneys for the petitioners stated they did not consent to such appointment. The return alleges, paragraph VII, pages 8 and 9, that the petitioners by their conduct in the case, including that with reference to the appointment of the special master, waived the right to the assembly of the court of three judges to pass on the application for interlocutory injunction.

Petitioners desire to show by evidence that when the interlocutory injunction was granted by the district judge upon May 18, 1929, the attorneys for the petitioners stated to the judge that Commissioner of Insurance Hobbs intended to enforce the rate order and to do everything necessary for its enforcement, and that there was no statement or admission on behalf of the petitioners, and there was no evidence introduced to the effect that the petitioners threatened to revoke the licenses of the insurance companies and their agents because such companies had brought the suits referred to in the district court, and that the only evidence presented to the judge at the hearing of May 18, 1929, consisted of the verified bills and the affidavits of J. V. Parker and Charles R. Street.

The return alleges, in substance, that the interlocutory injunctions were granted on the ground that the petitioners threatened to revoke such licenses because of the bringing of the suits in the United States district court. (Paragraph II, page 4; paragraph III, page 5; paragraph IX, pages 10 and 11 of the return.) We challenge the correctness of these allegations in the return and maintain that nothing occurred and no evidence whatever was introduced before the district judge to that effect. We call attention to the fact that the motion of the insurance companies for an interlocutory injunction, upon which the district judge acted upon May 18, 1929, makes no charge of that kind. (Pages 12 and 13, exhibit 1 of the return.) The order of May 18, 1929, granting the interlocutory injunctions, makes no reference to any such ground. (See

appendix F, page 172 of the petition.) This order is not denied in the return.

One of the points upon which we desire to take evidence, that is, in regard to the allegations in the return to the effect that the petitioners threatened to revoke the licenses for the reason that the suits were brought in the United States district court, would be in contradiction of the allegations in the return that representations were made to the district judge by the insurance companies to that effect. The other points would not be in contradiction of any allegation in the return as to what occurred in the presence of the district judge. Under the circumstances in this case, we contend that we have the right to introduce evidence contradicting that allegation as to representations.

There are cases which hold that in a mandamus proceeding to require a judge of an inferior court to sign and settle a bill of exceptions, the statement of such judge, as to what occurred in the case in his presence with reference to the matters covered by the bill of exceptions, would be accepted by the judge who issues the ruling to show cause or the alternative writ in the mandamus proceeding. Those are cases, however, where it did not appear that the judge of the inferior court was deliberately acting in violation of a statute. Where, however, there is a question as to an alleged disqualification of the judge, his decision upon such question is not conclusive.

Some allegations in the petition are not denied by the return, and are therefore to be taken as admitted.

Among the allegations of the petition thus admitted are the following: At the hearing of April 3, 1928, of the application of the insurance companies for a restraining order, "the defendants, by their solicitors, then and there stated to the court that they requested it to assemble a court of three judges to hear the application

of the plaintiff for an interlocutory injunction. The said judge, in reply, stated, in substance, that: You will have a difficult time in getting a three-judge court out of me." (Paragraph IV, page 14 of the petition.)

At the hearing of May 10, 1929, when the district judge appointed a special master in chancery, the district judge "further stated that he did not like to call a court of three judges, and that he thought this case could be disposed of before it would be necessary to call a court of three judges to hear an application for an interlocutory injunction, and that if the plaintiff would apply to him before May 20, 1929, for a restraining order against the defendants he would grant it." (Paragraph XIV, pages 22 and 23 of the petition.)

It is now not controverted that the district judge announced the intention not to comply with the statute providing for three judges. (Sections 66 as amended of the Judicial Code; United States Code, title 28, section 380.) The respondent is in the position of deliberately attempting to defeat the operation of the statute. Such being the case it could not be the rule, it is not the rule, and there are no considered authorities to sustain any such rule, that the statement of the respondent as to what occurred in his presence in the hearings in the cases in the district court may not be contested by the petitioners. The petitioners should be permitted to show what the facts are upon the points not admitted or which are in controversy upon the pleadings.

Respectfully submitted,

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas.
JOHN F. RHODES,
Attorneys for Petitioners.

□

Office Supreme Court, U. S.
FILED
JUL 1 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1929.

No. 20 Original.

EX PARTE

IN THE MATTER OF THE PETITION OF CHARLES F. HOBBS, COMMISSIONER OF INSURANCE OF THE STATE OF KANSAS and WILLIAM A. SMITH, ATTORNEY-GENERAL OF THE STATE OF KANSAS, for a Writ of Mandamus, TO THE HONORABLE JOHN C. POLLOCK, DISTRICT JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MANDAMUS.

RETURN TO RULE AND BRIEF IN SUPPORT THEREOF.

ROBERT J. FOLONIE,
ROBERT STONE,
JAMES A. MCCLURE,
Counsel for Respondent.

JONES & BIRCH, TOPEKA

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In the Supreme Court of the United States

OCTOBER TERM 1929.

No. 20 Original.

EX PARTE

IN THE MATTER OF THE PETITION OF CHARLES F. HOBBS, COMMISSIONER OF INSURANCE OF THE STATE OF KANSAS and WILLIAM A. SMITH, ATTORNEY-GENERAL OF THE STATE OF KANSAS, for a Writ of Mandamus, TO THE HONORABLE JOHN C. POLLOCK, DISTRICT JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MANDAMUS.

RETURN TO RULE.

Comes now respondent and in return to the rule entered upon him to show cause why a Writ of Mandamus should not issue against him "to call to his assistance two (2) other Federal Judges, as provided by Section 266 as amended of the Judicial Code, being Title 28, Section 380, United States Code, to hear and determine the motion and prayer of the plaintiff for an interlocutory injunction" etc., respondent answering says:

I.

The matters and things in said petition alleged and set forth are insufficiently and incorrectly set forth, and the statements of supposed fact therein are in error in the following specific particulars:

(a) There is no motion for interlocutory injunction in any wise pending in the court. The interlocutory injunction entered by respondent as a single judge (Appendix F, petition p. 172) was made pursuant to an application for interlocutory injunction to restrain cancellation of licenses, which motion was not upon the ground of unconstitutionality of any statute or order of any administrative branch of the State of Kansas nor is the said application upon which such injunction was issued set forth in the petition for mandamus. A true copy of the application filed by the plaintiff and presented to the court is hereunto attached and marked "Respondent's Exhibit 1."

(b) No application was before the court upon which action was taken or refused invoking a three judge court, nor any notice served upon the governor or attorney-general as provided by Section 266 as amended of the Judicial Code, being Title 28, Section 380, United States Code. Respondent says that the motion pursuant to such Act made by the plaintiff on April 11, 1928, (Appendix C to petition for mandamus, p. 95) was withdrawn (petition for mandamus, p. 22) and is no proper part of the record herein.

Further respondent says that the application for interloctuory injunction upon which respondent made his order for interloctory injunction was not nor was the making of such order in any wise upon the ground or basis, or upon the consideration of the question of constitution-

ty or unconstitutionality of any statute of the State of nsas, or any order of any administrative board of said ate.

(c) The affidavits presented by plaintiff upon applica- n for interloctuory injunction are mentioned in the tition for mandamus (pp. 23-24) but the contents there- not set forth. Respondent says that said affidavits, in njunction with the verified bill and verified motion for erlocutory injunction, disclosed adequate ground for in- locutory injunction entirely regardless of constitution- ty or unconstitutionality of any statute or order of any ministrative board of the State of Kansas.

(d) Petitioner, Charles F. Hobbs, Commissioner of surance of the State of Kansas, has threatened revo- ion of licenses of plaintiff insurance companies and ncellation of the licenses of their agents without any thority under the statutes of Kansas, (assuming the idity of all of them), and made no claim or assertion on the hearing of interlocutory motion of any act, or reatened act, of the plaintiffs in said causes in any wise thin the provisions of the statutes of Kansas providing revocation of licenses.

(e) Respondent specifically denies the allegation in Di- ion VI of the petition, and says that the actions pend- before respondent were in no wise suspended or action hheld thereon, or any agreement made to the knowl- ge of respondent, or any consent of respondent in any se had to suspend proceedings awaiting proceedings in her courts and specifically the three judge court in ssouri mentioned, and respondent says that the cases fore him pending have progressed without any sus- nsion thereof because of any of the supposed reasons said division of the petition mentioned.

II.

For further answer to the rule, respondent says that except as herein noted, there is no provision in the statutes of Kansas empowering petitioners, or either of them, to cancel licenses as a means of enforcement of the rate order complained of in the bill of complaint. The provisions of the Kansas statute respecting revocation of licenses are in the nature of penalties for acts committed, insolvency, and like conditions, none of which were shown or asserted on the hearing to exist.

Petitioners have specifically waived and disclaimed reliance upon the provisions of the statute providing for cancellation of licenses because of the filing of suits in the Federal Court and in printed briefs filed with this respondent upon their motion to dismiss the complaint.

Respondent says that the interlocutory injunction by him granted, and the application therefor, were not considered, based upon, or granted "upon the ground of the unconstitutionality of such statute", nor were the same an injunction or application for injunction "suspending or restraining the enforcement, operation, or execution of any statute, . . . or in the enforcement or execution of an order made by an administrative board or commission, . . . upon the ground of the unconstitutionality of such statute." (The words in quotations are from Section 266 of the Judicial Code stating requirements for a statutory three judge court.)

III.

The first application of the plaintiff for an interlocutory injunction, filed in April of 1928, was definitely abandoned and withdrawn by the plaintiff. The motion for an interlocutory injunction filed on May 16, 1929, a copy of which is hereto attached and marked Respondent's Exhibit I, was the only motion for an interlocutory injunction presented to the respondent. It did not appear to challenge the constitutionality of any statute or of any order of the commissioner of insurance. No notice of the hearing had been served upon the governor or the attorney general. The plaintiff definitely stated that it did not intend to press its prayer contained in its bill of complaint. The motion itself was limited to an application to restrain the commissioner of insurance from cancelling the license of the plaintiff and of its agents. It appeared to the respondent that the matter involved but one question and that the construction of the rate making statute, the applicants conceding for the purposes of the motion its constitutionality. Section 40-918, which corresponds with section 8 on page 177 of the petition for mandamus, authorizes the commissioner of insurance to revoke the license of a company if it has "violated any provision of this act." The plaintiff contends that it had not violated the statute by applying for a judicial review of the rate order as authorized by the statute, although it was continuing to collect the rate which obtained prior to the making of the order. The respondent, upon due consideration, held that the extreme penalty provided for "a violation of the act" could not be invoked because the applicant sought such judicial review, and where there had been no finding of or assertion of any other violation of the act. The enforce-

ment by the state of the rate order has not been restrained.

IV.

The respondent could not, under Section 266 of the code, assemble a three-judge court upon a motion where the applicants had not served the jurisdictional notice upon the governor and the attorney general even though it had appeared that the granting of the motion would of necessity be on the "ground of the unconstitutionality" of said statute. The respondent could deny the motion if the proper notices were not given and if so advised, but he could not assemble a three-judge court thereunder. There is not now and at the time of the motion of the petitioner herein, to-wit, on May 18, 1929, there was not pending before this respondent any motion in which the jurisdictional requirements of Section 266 permitted the assembling of a three-judge court.

V.

The order for injunction was carefully safeguarded so that if there were any violation by the plaintiffs respecting solvency, or conditions imposed on agents as recited in the statutes forming a ground for cancellation of licenses, the Commissioner of Insurance would be left free to proceed. He was only enjoined from cancelling licenses because of supposed violations of the rate order in question. The statutes make no specific provision for cancellation of license as a means of enforcement of a rate order.

VI.

For further return to the rule, petitioner says that a writ of mandamus ought not to issue because petitioners have an adequate remedy by appeal. The application for interlocutory injunction was not an application by the plaintiff under Section 266 of the Judicial Code as amended, for an interlocutory injunction upon the ground of unconstitutionality of a statute accompanied by a five day notice upon the governor and attorney-general of the State, nor was it an application to restrain enforcement or execution of a statute or order of an administrative board or commission acting under or pursuant to a statute asserted to be unconstitutional.

The only application for an interlocutory injunction before the court was the one set forth as respondent's exhibit 1, and upon it alone this respondent acting as a single judge has proceeded. The prayer of the petition herein and the rule upon respondent are to show cause why he should not proceed "to hear and determine the motion and prayer of the plaintiff", etc. Respondent has proceeded exactly according to the prayer of plaintiff's motion. Upon such application he has, according to the prayer and demand thereof for hearing before him alone entered an order which exhausted the power invoked by such application by granting the injunction as therein prayed for. Wherefore, respondent says there is nothing in any wise before the court requiring consideration of respondent or of three judges. Respondent states that the injunctional order so by him made is subject to appeal to the appropriate United States Circuit Court of Appeals by express authority of Section 129 of the Judicial Code.

Mandamus does not lie after notice of application for interlocutory injunction and ruling thereon, and entry of an order of injunction pursuant to such application.

VII.

For further return to said rule, respondent says that the prayer of the petition ought not to be granted because petitioners have waived the right to complain of a hearing before a single judge.

Respondent further says that plaintiffs did originally make an application for interlocutory injunction restraining enforcement of the statute and ruling of the administrative body, and for a hearing before three judges (Petition for mandamus, p. 95). Such application and the notice given thereunder to the governor and attorney-general were abandoned because of a pledge made by petitioners in open court and by them continued, pledging themselves to take no action subject of injunction and to permit no action which would be the subject of injunctional restraint (Petition, p. 14). Such pledge remained in full force from April, 1928, to May 20, 1929, during which interim, and because of such action of the petitioners, the plaintiffs were barred from applying for an interlocutory injunction and this respondent was barred thereby from instituting or creating a three judge court, or considering or granting or refusing an interlocutory injunction. During such interim, petitioners herein, being the defendants to said cause, presented a motion challenging the sufficiency of the bill of complaint, and asserting a claim of res judicata, copy of which motion so by petitioners filed is hereunto attached and marked "Respondent's Exhibit 2". Such motion was filed on May 7, 1928, and respondent as sole judge

and upon the motion of the petitioners (defendants to said suit) did have said matter under consideration, and heard arguments thereon, and considered briefs filed by the parties, and on the 8th day of January, 1929, decided such motion against the contention of the petitioners. In such interim, this respondent appointed a master in chancery and referred the case to a master for hearing, and made orders respecting depositions and the hearing of the cause, a copy of which order so appointing the master is hereunto attached and marked "Respondent's Exhibit 3."

Respondent further says that by the said pledge and action of the petitioners, and by barring the institution of a three judge court for more than a year, and by submitting the sufficiency of the bill of complaint to the respondent as a sole judge, and by submitting the sufficiency of pleadings to respondent, by permitting the matter to be referred to a master, by permitting an order for the taking of depositions, and so proceeding before respondent as the sole judge, thereby petitioners have joined in constituting respondent as the sole judge to hear said cause and waived any provision of the law for their benefit respecting institution of a statutory three judge court. Respondent further says that petitioners may not thus accomplish a change of venue by the device of a pretended withdrawal of their pledge to refrain from action subject to interlocutory injunction, and after an adverse ruling upon matters involving the merits of the matter compel the court to reconstitute the court upon a threat of cancellation of licenses not authorized by statute and no part of the power of enforcement of the statute and administrative order made pursuant thereto and resorted to as a mere device to reconstitute

the court so that the merits of the controversy may be submitted to a different tribunal.

VIII.

For a further return, respondent says that the bill of complaint of the plaintiff proceeds upon and gives jurisdiction to the District Court upon the ground of diversity of citizenship, entirely independent of the questions of constitutionality of statute therein raised, and therefore respondent says that the mere fact that an interlocutory injunction is asked or granted does not of necessity involve determination of any constitutional questions, nor necessarily require a statutory three judge court, nor necessarily involve an appeal to the Supreme Court.

IX.

The restraining order issued was collateral, or at most purely incidental, to the principal controversy. The plaintiffs did not seek any action restraining the state from enforcing the rate order. After the respondent ruled on the motion to dismiss, and decided that the validity of the rate order should be determined on its merits, the plaintiffs represented that the state was threatening to defeat the jurisdiction of the court by cancelling their licenses. To protect that jurisdiction, and without any constitutional claim being drawn into question, the order was issued. The plaintiffs could have presented the question of the power of the state to revoke their licenses because they brought an action in the courts of the United States to test the rate order, in an independent action; they can still do so; and if such

procedure had been or is adopted, no question could arise as to the assembling of a three-judge court. Such being, in substance, what was done, the defendants cannot demand a three-judge court simply because the form of the action taken was an incidental step in the main case, rather than independent actions.

WHEREFORE, having made full return of his reasons why a rule should not issue as prayed for, and having fully answered the said rule, respondent prays that the said rule may be discharged and said petition for mandamus may be dismissed.

JOHN C. POLLOCK,
Respondent.

ROBERT J. FOLONIE,
ROBERT STONE,
JAMES A. MCCLURE,
Counsel for Respondent.

RESPONDENT'S EXHIBIT 1.

MOTION.

Comes now the plaintiff in the above entitled cause and respectfully represents to the court that the plaintiff has heretofore made its written motion for temporary restraining order and motion for interlocutory injunction, and upon the coming on of said motions for hearing, the then defendants "in open court stated to the court that they would take no action and permit no action which would be the subject of restraining by temporary restraining order, without first giving notice to the plaintiff and its counsel of intentions so to do in ample time so that plaintiff may resort to this court for an appropriate order", and

The court thereupon made a finding "that the defendants are honorable persons whose assurance may be taken in such matters. The court does now accept their said assurance, and upon said consideration does refrain from entry of any temporary restraining order, with leave to the plaintiff to renew said application at any time if the plaintiff be so advised," said order being dated April 3, 1928.

Relying upon such pledge of defendants, plaintiff has refrained from prosecuting or presenting such matters, and refrained from prosecuting its application for interlocutory injunction.

Thereafter, and subsequent to the entry of said order aforesaid, the defendants did present before Honorable John C. Pollock, Judge of said Court, a motion of the defendants to dismiss the bill of the plaintiff, which motion was argued, briefs filed, and ruling of the Court was had thereon, said motion being overruled.

Thereafter, the defendants filed their answers. A reference of said cause has been had under the order of the Court to a special master, to-wit: Hon. Chas. G. Yankey, to hear the evidence and report thereon his findings of fact and conclusions of law; and an order has been entered by the Court for the taking of depositions.

Plaintiff further says that the defendants have now served written notice upon the plaintiff that they withdraw their pledge to the Court and will, if not restrained by order of the Court, after May 20, 1929, proceed "to enforce the rate order made by former Superintendent of Insurance, Travis, on January 20, 1922, which by its terms was to have taken effect on March 1, 1922, and which rate order is referred to in the bill of complaint of plaintiff in said case, "meaning and intending thereby, as this plaintiff believes and therefore alleges, to cancel the license of this plaintiff to do business in the State of Kansas, and otherwise proceed and act against the plaintiff to its irreparable injury and damage.

Plaintiff moves that an interlocutory injunction may be granted to it to restrain the defendants and each of them, their attorneys, agents and employees from in any wise cancelling the license of the plaintiff to do business in the State of Kansas, and that defendants be restrained from cancelling the licenses of the agents of the plaintiff because of any supposed violation of the said rate order aforesaid and the terms thereof, and that said interlocutory injunction remain in force until further order of the Court.

Whereas, an identical situation exists in each of the one hundred forty-nine (149) other similar cases brought in this Court by various insurance companies against the same defendants and upon identical causes of action, now, therefore, the plaintiffs in each of said causes, being numbered 962-N and 964-N to 1111-N inclusive, each makes like motion.

Robert J. Folonie,
Robert Stone,
James McClure,
Solicitors for Plaintiff.

Jurat—sworn to by Robert Stone.

RESPONDENT'S EXHIBIT 2.

MOTION TO DISMISS THE SUIT.

Come now William R. Baker, commissioner of insurance of the state of Kansas, and William A. Smith, attorney-general of the state of Kansas, defendants in the foregoing entitled cause, and move the court to dismiss the above entitled suit, for each and all of the following grounds, to wit:

1. The bill in equity filed by the plaintiff in said suit shows that the pretended cause of action alleged in said bill has been litigated by the plaintiff herein by suit in the state courts of Kansas, and that the supreme court of the state of Kansas has rendered a decision and judgment in said suit which upheld the rate order of the superintendent of insurance of the state of Kansas, complained of in said bill in equity, and decided and adjudged against the plaintiff herein, and that the supreme court of the United States has denied the application of the plaintiff for a writ of certiorari to review said decision and judgment of the supreme court of the state of Kansas. Said decisions and judgments of the supreme court of the state of Kansas and of the supreme court of the United States, alleged in said bill in equity, constitute *res judicata* of the pretended cause of action alleged in said bill in equity and constitute a bar to the maintenance or prosecution of the above entitled suit.

2. The bill in equity of the plaintiff herein does not allege sufficient facts to constitute a valid cause of action in equity in favor of the plaintiff and against the defendants herein, or either of them.

3. The bill in equity of plaintiff herein does not allege sufficient facts to show that the plaintiff is entitled to the relief prayed for by it against the defendants, or either of them.

WHEREFORE, Defendants pray that the above entitled suit be dismissed and that the costs be taxed against the plaintiff.

Respectfully submitted,

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas,
ROLAND BOYNTON,
Assistant Attorney-general of the State of Kansas,
JOHN F. RHODES,
Solicitors for Defendants.

RESPONDENT'S EXHIBIT 3.

ORDER OF REFERENCE.

On this day there appear the parties hereto by their attorneys, R. J. Folonie and Robert Stone for the plaintiff, and John G. Egan and John F. Rhodes for the defendants, and plaintiff represents to the court its motion for an order of reference of this case and the appointment of a Special Master to hear the same.

Upon examination of the files herein and upon hearing said motion and being fully advised in the premises, the court finds that the issues in this action involve complicated matters of accounting; that the accounts involved extend over a period of years and that the same will involve a vast amount of evidence to an extent such as to make it difficult and impractical to have the case heard before the court; and that conditions exist which require the same to be, and the same should be, granted.

It is therefore by the court ordered that Chas. G. Yankey, of Wichita, Kansas, be and he hereby is appointed as Special Master in this action to hear and determine the issues thereof; and for that purpose this

action is referred to said Chas. G. Yankey; and it is further by the court ordered that said Chas. G. Yankey, as master, proceed in conformity with the rules to cause this case to be set down for hearing, notifying the parties of the time and place of such hearing; hear all of the evidence relating to the issues involved in this action, with full power to examine the parties and witnesses in this cause upon oath, touching all matters pertinent to this action, and to require the production of all papers and documents applicable thereto, and generally to do all other acts and direct all other inquiries and proceedings in the matters before him which he may deem necessary and proper to the justice and merits hereof and the rights of the parties; and said master shall at the completion of such hearing and in due time, make findings of fact and conclusions of law of and concerning the issues in this case and file the same together with all the evidence taken in the case with the Clerk of this Court. The said master is authorized to require the parties from time to time to make such deposits as may, in his judgment, be necessary to cover the expenses of this reference including compensation of stenographer or stenographers for the taking and transcribing of the testimony.

BRIEF IN SUPPORT OF RETURN TO RULE.

STATEMENT OF CASE.

The bill in equity invoking the jurisdiction of the court appropriately sets forth diversity of citizenship as a ground of jurisdiction (Petition for Mandamus, page 41) and discloses that the necessary jurisdictional amount is involved (Petition for Mandamus, page 40). In addition it asserts unconstitutional invasion of right by a rate order (Petition for Mandamus, page 40) and Federal unconstitutionality of sections of the statutes, pursuant to which the rate order was made, and in particular Section 3 of such rating act, purporting to empower the Superintendent to make rate orders (Petition for Mandamus, page 41).

Plaintiff in each of the cases in question was a fire insurance company and filed its said bill in March, 1928 (Petition for Mandamus, page 94). On April 11th, 1928, the plaintiffs in such actions made a written application for interlocutory injunction, restraining enforcement of statute and rate order, and praying for the assembly of a three-judge court (Petition for Mandamus, page 95). Appropriate notices were served upon the Governor and Attorney General at that time. (Return to Rule, page 8.) Such application for an interlocutory injunction was abandoned upon a pledge made by the defendants in open court that they would take no action subject to interlocutory injunctional restraint. Upon the making of such pledges the court ruled that an injunctional order was not necessary and could not be considered. This appli-

cation was abandoned and withdrawn. (Petition for Mandamus, pages 14-15). While such pledge was effective and in force, (it remained in effect for more than a year), the petitioners herein, (defendants below), presented a motion challenging the sufficiency of the bill of complaint and set up a defense of *res judicata* which were submitted to the respondent as a single judge (Respondent's Exhibit 2; Return to Rule, pages 14-15.) Such motion was filed on May 8, 1928, was briefed and argued, and was decided against the contention of the petitioners on the 8th day of January, 1929, (Return to Rule, page 9). Respondent, sitting as sole judge, also made an order appointing a master in chancery, and made an order of reference of the case, and made orders respecting depositions, and conduct of the case upon its merits. (Respondent's Exhibit 3; pages 15-16 of Return to Rule, and see also Return to Rule, page 9.)

Thereafter, on the 16th day of May, 1929, the plaintiffs made a new and verified application to respondent for interlocutory injunction (see Respondent's Return to Rule, page 5) and with such application filed affidavits disclosing the right to an interlocutory injunction. Such application for interlocutory injunction did not pray for formation of a statutory three-judge court, nor was the injunction urged or granted upon consideration of any claim of unconstitutionality of any statute, or order of any administrative board or commission (see application for interlocutory injunction; Respondent's Exhibit 1; pages 12-13 of Return to Rule). The plaintiff, upon such application, expressly announced that it did not request a three-judge court (Petition for Mandamus, page 172).

The reasons asserted, why a writ of mandamus should not issue against him as prayed are set forth in the return

o the rule and further presented in the argument and ill not be here reiterated.

ARGUMENT.

I.

In coming to correct conclusions as respects issuance r refusal of a writ of mandamus it is important that the ourt be not misled on the facts. Attention is in this divi-ion of our brief called to pertinent facts set forth in the eturn to the rule which go in contradiction or explanation f matter contained in the petition.

(a) An examination of the application for injunction hich is annexed as Exhibit C (Petition for Mandamus, age 95) might readily mislead the court into believing hat the application there appearing is pending before the ourt or was in some way involved in the hearing before he court when an interlocutory injunction was granted. uch is not the fact. The application appearing as Ap-endix C was not before the court, was withdrawn by the laintiff, and was expressly abandoned because of the ledge by the defendant (petitioners here) made in open ourt and recited in the order of April 3, 1928, wherein he petitioners expressly pledged themselves in open court ot to take any action subject to interlocutory injunction, hereupon the court declined to entertain such former pplication of the plaintiff (Petition for Mandamus, page 4).

(b) The only application for an interlocutory injunc-ion remaining in the record is application for interloc-tory injunction filed on May 16, 1929, copy of which is ttached to the return to the rule (Return to Rule, pages 2-13, being Respondent's Exhibit 1). Such application

was not based upon unconstitutionality of the statute or of the rate order mentioned in the bill of complaint, nor was the supposed unconstitutionality of any statute in any way considered by the court in granting such injunctional order. Such injunctional order was limited to restraining the petitioner, Chas. F. Hobbs, Commissioner of Insurance of the State of Kansas, from revoking the license of the plaintiff or its agents. For such threatened action he had no authority under the facts disclosed under any statute of the State of Kansas. There is no statute of the State of Kansas empowering him to revoke licenses as a means of enforcement of Section 3 of the rating act, pursuant to which he purported to make his rate order unless it be found in the sections hereinafter referred to. Neither is there any warrant by statute authorizing him to revoke licenses because of any violation of the rate order complained of. There was no showing of any kind on the hearing of such application that the plaintiff had committed any act of any kind coming within the provision of the statute giving rise to a revocation of licenses.

(c) The petitioner has not seen fit to set forth the affidavits presented upon the hearing of such interlocutory injunctional motion, although the petition shows that such affidavits were presented (Petition for Mandamus, pages 23-24). The verified bill of complaint and verified application for injunctional order restraining cancellation of licenses, together with such affidavits so mentioned but not set forth in the record, were ample to authorize the respondent to make an interlocutory injunctional order entirely regardless of the constitutionality or unconstitutionality of the rate order in question or the statute in question.

(d) There is no showing in the petition that there has been any action of the plaintiffs to the suits below, creative of any violation or claimed violation of a statute authorizing cancellation of licenses. The uncontradicted record is, that the petitioner, the Commissioner of Insurance, threatened to cancel licenses, although there was no action of any kind on the part of the plaintiff warranting such action. He was threatening to proceed without any warrant of law and not as an attempted enforcement of the statute of Kansas complained of in the bill or of the rate order therein mentioned. His threatened action was a purely wanton act, unauthorized by any power imposed on or remitted to him by law.

II.

The threatened action of the petitioner, Chas. F. Hobbs, Commissioner of Insurance of the State of Kansas, whereby he threatened to cancel licenses of the plaintiff and its agents was by a formal notice served by petitioners upon the plaintiffs (Petition for Mandamus, page 21), which was designed and intended as a threat that he would proceed to cancellation of licenses (see Plaintiff's Exhibit 1; Return to Rule, pages 12-13; see also Petition for Mandamus, page 22). The petitioner, Chas. F. Hobbs, Commissioner of Insurance of the State of Kansas, characterized his proposal to cancel licenses as an enforcement of his rate order and asserted the power of cancellation of licenses under statutes referred to in Division 18 of the Petition for Mandamus (pages 26-27), namely, Appendix J (Petition for Mandamus, page 182), and Appendix K, (Petition for Mandamus, page 184). Examination of these statutes discloses that they do not even remotely provide for revocation of licenses as a

means of enforcing the rate order set forth in the bill of complaint (Rate order appears in petition for mandamus, page 50, et seq.), nor are such provisions of the statute even remotely any authority to cancel licenses because of any supposed violation of the rate law in question (Section 3 of the rate law appears in petition for mandamus, page 175).

There is no assertion or claim that the Commissioner of Insurance has given any notice, or had any hearing, which are provided in the statutes providing for cancellation as conditions precedent to suspending certificate of authority, or that the plaintiff is "doing business" in violation of the law in any way. Power in said statute being that,

> "He may (after notice and hearing), if there is an unreasonable delay in restoring the solvency of such company and in complying with the law, revoke the certificate of authority of such company to do business in this state."

His power to cancel license under these two sections [App. J and K] is in the event of "insolvency or "doing business in violation of any of the laws of this state" (Petition for Mandamus, page 182). There was not even an intimation on the hearing or assertion or claim by the petitioners that there had been any notice by the Commissioner or any hearing by him, or that any ground for suspending or revoking licenses existed, or that plaintiff was "doing business" unlawfully. The injunctional order made by respondent restrains cancellation of licenses of plaintiff and its agents (Petition for Mandamus, pages 172-3). Petitioner asserts that he has power to revoke the licenses of agents as a means of the enforcement of his rate order (Peti-

tion for Mandamus, page 27). This statute is set forth as Appendix K to petition for mandamus at page 184. Such statute provides for the revocation of agents' licenses in the following cases only:

1. That a license was obtained by fraud or misrepresentation.

2. That the agent has misrepresented the terms and conditions of a contract of insurance.

3. That he has paid rebates of insurance premiums.

4. That he has made misleading misrepresentations or incomplete comparisons of policies.

5. That the interests of the insurer or the insurable interest of the people are not properly served under the license.

Such revocation as provided may only be had upon reasonable notice and hearing. There was no claim or assertion that there had been any notice, or any hearing, or that there was even an assertion of breach by any agent of the plaintiff of any of the conditions of such statute, but nevertheless it was proposed to cancel their licenses wholesale without any reason whatever, except the conclusions as stated in the petition (and not provided in the statute) that such revocation was a "means by which the Commissioner of Insurance can enforce such rate order" (Petition for Mandamus, page 27).

The interlocutory injunctional order restrains the Commissioner of Insurance only from cancelling licenses of the plaintiff and its agents, "because of any supposed violation by plaintiff of the rate order made by the Superintendent of Insurance of Kansas, issued January 20, 1922, effective March 1, 1922", (Petition for Mandamus, page 172). It is respectfully submitted that this injunctional order restrains nothing authorized or warranted

by the statutes, set forth with the petition for mandamus as Appendix J and Appendix K. The Commissioner is left entirely free to proceed under those statutes for any breach provided for in either of them. Neither statute covers what is barred by the injunctional order, namely, cancellation of licenses because of supposed violation of a rate order.

In the petition for mandamus, the statutes designated Appendix J and Appendix K are apparently relied on as the sole authority to the Commissioner of Insurance to make revocation of licenses.

There is one other section under which the Commissioner might claim the power to cancel plaintiff's license, but upon which he apparently does not rely because it is not referred to in the petition for writ of mandamus. This section appears in Exhibit H, page 177, and is as follows:

> "Sec. 8. That the superintendent of insurance, if he shall find that any insurance company, or any officer, agent or representative thereof, has violated any provisions of this act, may, in his discretion, revoke the license of such offending company, officer, or agent; but the revocation of any license, as provided in this section, shall in no manner affect the liability of such company, officer, agent, or representative to the infliction of any other penalty hereinafter provided by any other section for violation of this act."

We agree with the implied position of counsel for petitioners that this section has no application to this case. It is a penalty as indicated by the phrase, "Any other penalty" to be used for some wilful violation of the law. It is not intended as a means for enforcing any order of the Commissioner. It certainly is not intended for use against an insurance company which sees fit to avail

itself of the provisions of the following section (9) to set aside, vacate, or annul an order of the Commissioner. The plaintiff in this case has brought suit to set aside, vacate, and annul the rate order in question. By bringing this action, it has not violated any provision of this act, but has acted in pursuance of the provisions of the law by the terms of which

> "The court may permit any company complaining under this act to write insurance at any rates which it obtained prior to the ordering of the rate complained of, etc."

In compliance with this very provision, the plaintiff in this case in the joint action of insurance companies brought in the state courts has charged and it still charging the rates which it obtained prior to the ordering of the rate complained of, the excess amount so collected being still on deposit in the banks of Kansas (Exhibits to petition for mandamus, pp. 65 and 116) in the sum of $14,324.38 and further secured by a bond in the sum of $10,080.89 (Exhibit to petition, pp. 65 and 116), and this court has authority under the same section to permit the continuance of the charging and collection of the pre-existing rates under the same proviso.

It certainly is not intended by the Legislature that the severe penalty of revocation of a license should be used as a means for enforcing an order against a company which, in compliance with the terms of the law, was seeking to obtain a judicial construction of the order.

It will be observed that the motion of the plaintiff filed on May 16, 1929, and the order of May 18, 1929, granting said motion, are expressly limited to restraining and enjoining the cancelling of the license of the plaintiff because of "any supposed violation by plain-

tiff of the rate order made by the superintendent of insurance." The Commissioner is still left many other means for the enforcement of the order, and is still left free to cancel the license of the plaintiff on account of any other act or failure to act on the part of the plaintiff which would subject it under the terms of the law to a cancellation of its license. The only motion before the court asking for any injunction or restraining order was the one filed on May 16, being respondent's Exhibit 1 attached to the Return. Action upon this motion calls simply for a construction of the statute. It did not involve in any way constitutionality of any statute or of the order of the superintendent of insurance. It was not a matter requiring the assembling of the three-judge court. Section 266 of the Judicial Code provides

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of the state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order . . . shall be issued or granted . . . on the ground of the unconstitutionality of such statute, etc."

The issuing or granting of the injunction was not and could not be upon the ground of the unconstitutionality of such statute. So far as the granting of the motion is concerned, the validity of the statute was not called in question.

Injunction restraining such cancellation therefore is not any action for the enforcement of the rating statute, said to be unconstitutional, and therefore not within the provision of section 266 of Judicial Code. The injunction is limited to a restraint only against cancellation of license because of any supposed violation of the rate order re-

specting which no violation was asserted or claimed upon the hearing of the motion. The other reasons for cancellation which may exist under the statute are left unaffected by the injunction. The rate order was made under Section 3 of the Rating Act (Petition for mandamus, p. 175). The cancellation provision appearing in Section 9 is not asserted or claimed to be violated, or any act done other than continuing to charge and collect the pre-existing rates which could be construed as a violation of the rate order or the statute justifying it, unless it might possibly be violation of the prohibition appearing in Section 9 (Petition for mandamus, p. 179) where the provision appears "No action shall be brought in any of the courts of the United States to set aside any order made by the Superintendent of Insurance under the provisions of this Act before all of the remedies provided for herein shall have been exhausted by the party complaining." Cancellation of license is provided for violation of such provision. But for what is set out in the return it might possibly have been claimed that the plaintiff insurance company violated this provision by bringing the action in the District Court in which the injunctional order was made. The petitioners, however, have expressly waived and disclaimed reliance upon such provision of the statute and have, in printed brief filed with respondent upon motion to dismiss the suit, disclaimed reliance on such provision or any violation of it. In their brief before respondent, upon motion to dismiss suit, the petitioners say:

> "The statute could no more prevent a Federal Court taking jurisdiction if the remedy in the state court were administrative than if it were judicial. In either event, the provision would be ineffective to prevent a Federal Court taking jurisdiction."

They further say in their brief:

> "The provision referred to in the Kansas statute was therefore ineffective whether the suit in the state court to contest the rate order of the Superintendent of Insurance should be regarded as a judicial proceeding or an administrative proceeding, the Kansas rate statute was enacted in 1909 before the cases of Doyle v. Continental Insurance Co. and Securities, etc. Company v. Prewitt had been overruled."

The petitioners having expressly waived and disclaimed reliance on such provision, there is no remaining act charged or asserted against the plaintiff which could be claimed, or was asserted to be a violation of the rate order.

If it were assumed that the statutes permit cancellation of license as a means of enforcement of the rate order, and that all the views expressed in the foregoing section are in error, mandamus would still be inapplicable because the application for the injunction and the granting of it were not to restrain enforcement of the rate act or the statute, pursuant to which it arises, upon the ground of unconstitutionality. The motion and the injunction granted pursuant to it were *not* (a) pursuant to notice to the governor and attorney-general; (b) nor to restrain enforcement of statute or administrative order; (c) nor upon the ground of unconstitutionality.

The application was to a single judge without any attempt to comply with the provisions of Section 266 of the Judicial Code. Procedure under that section was expressly disclaimed (Pet. for Mandamus p. 22.) Neither was the unconstitutionality of any statute presented, considered, or determined in considering the application and ruling upon it. In consequence, the order is not one pursuant to Section 266 of the Judicial Code nor upon

the grounds of unconstitutionality of any statute, and therefore is an order which, by express direction of the statute, is appealable to the United States Circuit Court of Appeals.

III.

The chief ground for cancellation of license of an insurance company under the Kansas statutes is in case of insolvency. The whole tenor of the statutes relates to the question of solvency or insolvency as a test for revocation of license (Petition, p. 182). It is true that such statutes contain the provision that cancellation may be had in the event "that the solvency of any such insurance company is impaired, or that it is doing business in violation of any of the laws of this state." It is apparent from the examination of such statute that what is in contemplation in the statute is a failure of the company to comply with those directions of the statute authorizing it to enter upon the doing of business, and bearing upon the proof of solvency, the organization of the company and other attributes forming a basis for its entry into the state. The statute provides for notice and hearing, and other conditions precedent to revocation of license, none of which have been taken by the petitioner and with none of which he proposed to comply, as the matter was presented to respondent on the application for interlocutory injunction. The provision for notice and hearing (Petition, p. 182) applicable to revocation of a company's license are also applicable in case of an agent's license (Petition, p. 184), and there is no authority even remotely in these statutes authorizing cancellation of license as a means of enforcement of

a rate order. The order enjoining cancellation of license was carefully safeguarded so that the Commissioner of Insurance would be free to proceed with cancellations of license upon any ground he might have, other than supposed violation of the rate order before the court, respecting which the statutes gave him no power.

If the respondent were in error in his conclusion respecting the power under the statutes to cancel a license the matter would be error subject to correction on appeal and not by mandamus as the application and the court order pursuant thereto did not proceed upon the ground of unconstitutionality of any statute.

IV.

Petitioners have an adequate remedy by appeal to the Circuit Court of Appeals, which is provided by Section 129 of the Judicial Code. An appeal is expresly authorized in case of issuance of an interlocutory injunction order. This court has frequently granted mandamus but only in aid of its appellate jurisdiction in cases where no appeal could be had from action taken or refused. A typical case where mandamus will lie because there is no right of appeal, is in a case where a plaintiff makes an application for interlocutory injunction, praying that the matter may be heard before three judges, serves statutory five day notice upon the governor and the attorney-general, and upon the coming on of such application the district judge, acting alone, denies such application or refuses to act upon it. In such hypothetical case it is not appealable for the reasons:

(a) The case is not appealable to the Supreme Court because it was not heard before three judges, and only a case so heard is appealable to the Supreme Court.

(b) The case is not appealable to the Circuit Court of Appeals because the application for interlocutory injunction proceeds upon the ground of unconstitutionality of a statute, and such an order is not appealable to the Circuit Court of Appeals.

The present case does not fall within the class of cases so assumed because:

1. The application for interlocutory injunction did not proceed upon the ground of the unconstitutionality of any statute.

2. It was not made pursuant to notice to the governor and the attorney-general.

3. The plaintiff expressly disclaimed that it was proceeding under Section 266 of the Judicial Code, and expressly disclaimed asking for three judges or proceeding under Section 266 (Petition, p. 22).

The plaintiff in such action not proceeding under Section 266 of the Judicial Code in compliance with its conditions, and expressly disclaiming that it proceeded under such section, placed respondent in the position where acting as a single judge he must grant or refuse the application upon the merits of it, free from any consideration of constitutional grounds of attack. For the purpose of the motion respondent must treat the provisions of the statutes of Kansas as constitutional and valid measures, and determine the motion exclusively upon the assumption that such statutes although valid gave no power for cancellation of license. Or he might find that under the facts there was no breach or asserted breach falling within the terms of the statute, and therefore regardless of its constitutionality the respondent

was authorized to determine such motion for or against the application. He may have determined the question erroneously, but that is not here for consideration. That can be determined only upon appeal to the United States Circuit Court of Appeals. The District Court has exhausted all of the powers invoked by such application by granting the injunction. Petitioners did not proceed by mandamus after notice of the application for injunction, and before ruling thereon, nor request the court to refrain from issuing an injunction order until they could have made an application for mandamus, which doubtless would have been granted, but proceeded to present the merits of such injunctional application and permit the matter to proceed to the point of an injunctional order. If the application for mandamus would lie at all, which we deny, it is clearly too late because an injunction has issued *according to the prayer of the application* for an injunction. The plaintiff in the suit below could not be required to present constitutional attacks upon a statute as grounds for an interlocutory injunction if it saw fit to proceed on other grounds, as it did. It was within the power of the plaintiff below to proceed for an interlocutory injunction regardless of constitutional considerations if it were so disposed. The petitioners here (defendants below) are not in position to ask for an injunction order against themselves, and are not in position to control the action of the plaintiff as to how it shall apply for an injunction or what the scope of plaintiff's prayer for injunction shall be. The defendants to an injunction suit may resist an application for an injunction, but may not change the scope of the application, for an injunction, as presented by his opponent. If the plaintiff in such a case applies for an injunction

before a statutory court, and complies with Section 266, the defendants are not in position to complain if a single judge *denies* the application. Likewise, they are not in position to complain of an interlocutory injunction granted by a single judge upon an application made by the moving party, the plaintiff, for an injunction before a single judge, upon grounds other than constitutionality of a statute or administrative order, except as they have a right of appeal from such injunctional order if the same is asserted to be unwarranted upon the facts.

V.

The petitioners have waived the right to complain of a hearing before a single judge. Section 266 of the Judicial Code providing for a statutory three-judge court is to the effect that the suspension of a statute by enjoining operation of a state law, or order of an administrative body, shall not occur except on solemn determination by a court of three judges. The purpose of the law is to prevent arbitrary or ill-considered action, and to safeguard the suspension of a law before hearing upon the merits is had. A single judge is regarded as equally qualified as three judges to determine such matters when all the evidence has been produced. It is only in case of application for an interlocutory injunction which seeks to *suspend* the operation or execution of a statute or administrative order upon the *ground* of the *unconstitutionality* of such statute under the Federal Constitution that three judges are required. Prior to the application for an interlocutory injunction here for consideration, the plaintiffs had made an application for an interlocutory injunction and a hearing before three judges (Petition for mandamus, p. 95), but such appli-

cation and the notice thereunder to the governor and attorney-general were abandoned and eliminated from the record. The application for a general order of injunction restraining enforcement of the statute because of its unconstitutionality was withdrawn because of a pledge made by petitioners in open court, pledging themselves to take no action and to permit no action which would be the subject of injunctional restraint (Petition, p. 14). In reliance on such pledge, the court expressly refrained from making any order or giving any consideration to such application, which was made in April, 1928 (Petition, p. 14-15). The pledge of the petitioners was kept in force until May 20, 1929, (Petition for mandamus, p. 22). In the meantime; (that is, from April, 1928, to May, 1929,) the institution of a statutory three judge court and application for an interlocutory injunction on account of unconstitutionality of the statute were prevented by actions of the petitioners. During all that period of more than a year, the district judge, respondent herein, and the plaintiffs to the suits below were barred by acts of the petitioners from instituting or creating a three judge court, or considering or granting any interlocutory injunction. While the matter was in that position, the petitioners (Defendants below) presented a written motion challenging the sufficiency of the bill of complaint and asserting that the same was barred by res judicata (Respondent's Exhibit 2, Return to Rule, pp. 14-15). Such motion of the defendants was filed on May 8, 1928, and questions presented thereby decided by the respondent as a sole judge upon motion of the petitioners on the 8th day of January, 1929, on which date the respondent decided such contention against the petitioners. The respondent, thereafter and before the threat to

cancel licenses, appointed a master in chancery and referred the case to him for hearing, and made orders respecting depositions (Respondent's Exhibit 3, Return to Rule, pp. 15-16). Petitioners have, by their own action, caused respondent to proceed as a single judge and take jurisdiction over the action and have by their pledge deprived the plaintiffs of the power of instituting a statutory three judge court. Having submitted the sufficiency of the bill of complaint to a single judge and settled pleadings, permitted reference to a master, and entry of sundry orders pertaining to the merits, petitioners have by their own actions joined in creating a court consisting of a single judge. They have by such actions waived any provisions of the law made for their benefit as respects creation of a statutory court, and have submitted the matter to a single judge for decision. By their actions, the matter was, from a legal standpoint, placed in the same position as if there were no application for interlocutory injunction in which case a final hearing need not be had before three judges. T. L. Smith, Sr. v. Louis J. Wilson, 273 U. S. 288.

The action of the petitioners in pretending to withdraw their pledge and threatening to cancel licenses was not done in a bona fide desire to cancel licenses, but in the belief by the petitioners that by serving a notice withdrawing their pledge they would thereby force the plaintiff to action which would reconstitute the court and thereby the petitioners could secure what was in effect a change of venue from the respondent whose decision on the motion to dismiss the bill was not to their liking. Section 266 of the Judicial Code is not to be extended beyond the purposes defined therein. It is detrimental to the interests of justice that defendants to a suit may

make a pledge of action, not controllable by the opponents to the suit, whereby they debar the court and the opposing parties from securing an interlocutory injunction; debar them from instituting a statutory court to hear the application for an interlocutory injunction (by statement that they do not intend to enforce the rate order and will take no action subject to interlocutory injunction); and thus keep a single judge if they will or reconstitute the court at their will if the judge later displease them. Petitioners may not justly submit the merits to a single judge by a motion to dismiss, and retain a single judge if he rules favorably to them, and withdraw their pledge and secure a new court who may reverse his ruling if his decision proves unsatisfactory. The action of the petitioners in this respect is comparable with their action in presenting a petition for mandamus herein, which upon its face would naturally leave the impression with the court that the injunction granted was pursuant to application under Section 266 of the Judicial Code, whereas, they well knew that the application appended to their petition was expressly withdrawn and was not the one under which the court proceeded. It is true that the fact of withdrawal of this application is set out in the body of the petition, but it is so covered up that the court might well be misled, and the petition bears every indication that the petitioners were extremely careless or willing that the court should fall into error in the matter.

VI.

The bill of complaint establishes jurisdiction in the district court upon the grounds of diversity of citizenship entirely independent of constitutional questions involved. The jurisdiction not being dependent solely upon Federal Constitutional grounds, and the district court having jurisdiction of the controversy entirely regardless of such issue, when application for an interlocutory injunction is made, it may be dependent upon constitutional grounds or it may not. In a case where the sole power of the court to take hold of the controversy rests upon a constitutional attack on a statute, then the application for interlocutory injunction commonly involves a constitutional inquiry. Where the court has jurisdiction on the ground of diversity of citizenship, however, an application for injunction when presented may or may not proceed upon Federal Constitutional grounds. In this case, the interlocutory injunction prayed for and granted did not involve a decision of constitutional question, and such application does not invoke a statutory three judge court, nor necessarily require an appeal from a final decree to the Supreme Court of the United States. Lemke v. Farmers Grain Co., 258 U. S. 52. An application for mandamus in this court is an exercise of this court's appellate jurisdiction. Maryland v. Loper, 270 U. S. 9. Such appellate jurisdiction may not be invoked in a case which upon a final hearing will (so far as the present state of the record discloses) upon final hearing be appealable to the United States Circuit Court of Appeals and not to this court. Ex parte Glaser, 198 U. S. 171.

In conclusion, we respectfully submit that for all the grounds foregoing, mandamus ought not to issue; that the respondent is right in his view as set out in his

return to the rule, that a statutory three judge court is an exceptional court and not the rule, and should be instituted only in cases clearly requiring it. The institution of such a court is cumbersome; it makes for delay by calling busy judges from their homes to foreign cities. We can think of nothing more futile than to solemnly assemble three judges to convene in Kansas to hear an application to restrain cancellation of licenses where the sole ground presented in support of such application is that there is no power under the statute to cancel licenses because a company seeks a judicial review of a rate order when that threatened cancellation of license is not for breach of any statutory inhibition but lawless use of power. Such an argument, if presented before three able judges, would present none of the aspects of suspension of a statute on the ground of unconstitutionality which is the sole situation in contemplation of the Section 266 of the Judicial Code. The rule on the respondent ought to be discharged and the petition for mandamus dismissed.

Respectfully submitted,

ROBERT J. FOLONIE,
ROBERT STONE,
JAMES A. MCCLURE,
Counsel for Respondent.

SUPPLEMENTAL.

At the outset of this litigation, the plaintiffs made application for a temporary injunction under section 266 of the Code, serving the jurisdictional notices upon the governor and attorney general. That application was not pressed, because counsel for the defendant agreed that no effort would be then made to enforce the orders. No threat existing to enforce the order, no three-judge court could be assembled; and the application under section 266 was later expressly withdrawn.

If the pledge had not been made, the application for a statutory court would have been pressed and would have been granted and the matter of the sufficiency of the bill and other steps looking toward a disposition on the merits, would have been heard by three judges. Relying upon the pledge, however, the respondent heard arguments on the many complicated and difficult matters presented by the motions to dismiss; considered exhaustive briefs, and in fact spent all his available time for many months on this important litigation. It is submitted that it is unfair for petitioners, having had the benefit of such exhaustive study by respondent, and having lost, to now assert the right to re-submit his case to a three-judge court. Respondent would not have devoted many months of time to the consideration of petitioner's motion to dismiss and his briefs in support thereof, if he had been advised that petitioner intended, if he lost, to then ask for a three-judge court.

Later in the litigation, and after an adverse ruling on the motion to dismiss, the petitioner even then did not threaten to appropriately enforce the rate order in question. The rate statute expressly provides for a judicial review of a rate order, on condition of impounding pre-

miums, etc. This case is *under* the precise terms of the statute, the defendants impounding such premiums. No penalty can be enforced for seeking such judicial review. The rate statute does provide a penalty—the cancellation of the license—as a penalty for a company who "violates" the statute, but such penalty cannot in the judgment of the respondent be invoked against a company who proceeds under the statute. The provision for judicial review would be worthless if a commissioner could forfeit the license of a company because it seeks a judicial review of a rate order.

The plaintiffs have not asked, and do not now ask, for an interlocutory injunction against the enforcement of the rate order. The defendant takes the initiative, not by threatening to disburse the impounded funds, or to otherwise enforce the rate order, but by a threat to cancel the licenses of the companies as a penalty for the plaintiffs' seeking a judicial review *under* the statute. The defendants demand the three judge court.

The plaintiffs then apply for an interlocutory injunction against this threat of a penalty for coming into court. No question of constitutionality of any statute or order is presented. The only question presented is one of statutory construction, to-wit, under the statute, conceding its constitutionality, can a company's license be forfeited because it asks a judicial review of a rate order?

Rightly or wrongly, the respondent decided that such statute, properly construed, could only be used to punish a company which violated the statute, and not one which was proceeding under it. If that construction is erroneous, it can be corrected on appeal.

For it would be impossible for the respondent to assemble a three judge court, under the application on file,

because the plaintiffs have not served the jurisdictional notices on the governer and attorney general. The respondent may have erred in his construction of the statute and in granting the interlocutory injunction; but he could not assemble a three judge court under that application, the only one pending.

The restraining order issued was only an incidental step in the main case. The situation was the ordinary one of a party having lost on a protest of sufficiency of the bill, then undertaking to defeat the jurisdiction of the Court the plaintiff, first asked to restrain the enforcement of the rate order, but for reasons of its own withdrew that request. That left the state free to enforce the order. The state then challenged the sufficiency of the bill, and the bill was held sufficient. Then, the respondent was advised that, because of the pendency of the suit, or because the motion to dismiss had been ruled adversely to the Commissioner for some other reason, the Commissioner threatened to cancel the license of the plaintiff. The plaintiff perforce must abandon its lawsuit, rather than have its license cancelled.

That situation was presented to the court. No constitutional question was involved. No question of enforcing the rate order was involved. The only question was the power of the Commissioner, under the statute, to cancel licenses without notice or hearing, and simply because the rate order was challenged in court. Nothing but statutory construction was involved. The plaintiff did not proceed under section 266. No question covered by section 266 was presented. At the time, it occurred to respondent, that the question more properly should have been made the subject of an independent action, rather than mixing it up with the rate case, to which it was at best only incidental; that, more accurately, the

rate case was the cause of the threat—a fact involved in the matter, rather than the source of it. No party objected to taking the matter up in the rate case, rather than by independent action, the respondent did not raise the point and passed upon the motion.

The propriety of mandamus can be tested by that point. No one, it is believed, would deny the propriety of a simple bill of complaint, alleging the threat, that no power existed to cancel licenses because of the suit to test the order, and asking for an injunction. If that had been done, if it was now done, no three judge question would have arisen. Yet that is this case, complicated only by the fact that plaintiffs entitled their pleading in this case instead of in a new one.

JOHN C. POLLOCK,

Respondent.

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In the Supreme Court of the United States

No. 20. Original—October Term, 1929.

EX PARTE: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable John C. Pollock, District Judge of the District Court of the United States for the District of Kansas.

BRIEF OF RESPONDENT

IN OPPOSITION TO:

(a) APPLICATION OF PETITIONERS FOR LEAVE TO FILE A REPLY TO THE RETURN;

(b) APPLICATION OF PETITIONERS FOR APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

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JONES & BIRCH, TOPEKA

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STATEMENT.

The return filed by respondent was directed to a rule to show cause why respondent should not—

> "call to his assistance two other federal judges as provided by section 266, as amended, of the judicial code, being title 28, section 380, United States Code, to hear and determine the motion and prayer of the *plaintiff* for an interlocutory injunction."

The rule was issued at the instance of the *defendants* to the suit and not of the plaintiff. The return to the rule shows various reasons why it should be discharged, among others, that there is no application for interlocutory injunction pending (Return to Rule, p. 2); that the application for an injunction set up in the petition for mandamus is not the application which was before the Court when the matter came on for hearing below, but had been expressly withdrawn (Return to Rule, p. 2); that the application for injunction was not made pursuant to section 266 of the judicial code by service of notice upon the Governor, etc., wherefore there was no power in respondent to assemble a three-judge court (Return to Rule, p. 2); that the petition for mandamus inadequately sets out the matters occurring in the court below (Return to Rule, p. 3); that petitioners have threatened revocation of licenses without any authority under the law to take such action (Return to Rule, p. 3); that respondent has no knowledge of any agreement to suspend action in the case because of proceedings in Missouri, and the cases have not been suspended for any such reason (Return to Rule, p. 3).

Further affirmative reasons for discharge of the rule appear in the return, which it is not necessary to here reiterate.

Petitioners now present a proposed reply to the return. It is the view of the respondent that, if such a reply is either not admissible under proper practice, or the same is of such nature that if it were on file it would be stricken off, then leave to file it ought to be

denied. It is not necessary to examine the proposed reply in detail, because the petitioners have set out in their brief for the appointment of a commissioner what they consider to be the gist of their reply and what they propose to prove under it. These, as set forth by the petitioners in such brief, are:

(a) Petitioners "desire to show by the evidence *** the affidavits of J. V. Parker and Charles R. Street." (Brief on motion for appointment of a commissioner, p. 3.) (If these affidavits have any propriety at all, they were part of the record which should have been produced upon the original application. They cannot be injected into the hearing after return to a rule has been filed. Even now, they are not offered in complete form.)

(b) Petitioners state that they desire to show by evidence that a great many suits were pending in Missouri bearing some similarity to Kansas cases and that there was "a conversation between the attorneys for the opposite parties in the Kansas cases," etc. (Brief, p. 4.) (There is no suggestion in the reply or the brief that respondent had any knowledge of such conversations or participated in them in any way, or was influenced by anything that may have been discussed between counsel.)

(c) "Petitioners desire to show by evidence" that they did not expressly consent to the appointment of a master (Brief, p. 4).

(d) "Petitioners desire to show *** there was no evidence introduced to the effect that petitioners threat-

ened to revoke the licenses." (In the proposed reply of the petitioners to the return (at p. 5), they set forth that the petitioners had power under the statutes to cancel licenses, and assert that it is an appropriate method of enforcement of a rate order. There is no denial by petitioners that they served a written notice that they would enforce the rate order by means within their power. They admit serving a written notice that petitioners would proceed "to enforce the rate order" (Return to Rule, p. 13), and assert in the proposed reply to the rule (at p. 5), that the means of such enforcement is by cancellation of license.)

We specifically call to the attention of the Court that in the proposed reply the petitioners expressly admit (Reply of Petitioners, p. 6) that the motion for assembling of a three-judge court, of April 11, 1928, attached to the petition for mandamus as Appendix C, "was withdrawn by the plaintiff by oral statement before the respondent at the hearing before him on May 10, 1929." It is also expressly admitted in this proposed reply that respondent's Exhibit 1 "was the only motion for interlocutory injunction presented by the plaintiff to the respondent." (Reply p. 6.) The rule was issued against respondent under a petition which clearly carried the inference that the application for a three-judge court, attached to the petition as Appendix C, was before the court below. This court was warranted in assuming that it was action under that applicaton which it was seeking to coerce. As it now appears by admissions of the respondent that the record is not as the court

was so led to believe, this Court would be warranted in dismissing the petition for mandamus without any further consideration of other matters involved.

If proper practice in this court requires a court to take the answer of the respondent as true, then no reply should be permitted and no commission for taking evidence should issue.

BRIEF OF ARGUMENT.

The action of the petitioners, in presenting a proposed reply and asking for appointment of a commissioner, is an admission of the sufficiency of the answer of the respondent, if the facts therein be accepted as true.

Petitioners call attention to *Rule 5* of this court, whereby it is provided that:

> "This court considers the former practice of the courts of King's Bench and of chancery in England as affording outlines for the practice of this court in matters not covered by its rules or decisions or the laws of Congress."

By "*former* practice" of the court of King's Bench, we understand, as the petitioners evidently do, that the practice of the court of King's Bench is adopted as it existed at the time of the formation of this government without consideration of acts of parliament which may have been enacted since the formation of the government of the United States.

A text dealing exclusively with practice respecting mandamus in the courts of King's Bench of England is

that of *Thomas Tapping on Mandamus.* In the edition of 1853 he says:

> "At common law, no traverse to a return was allowed, the only remedy then available for the prosecutor, if injured by a return false in fact, being an action on the case for such false return." (P. 422 *383.)

It is such common law practice which we regard as presumably in force in this court. In every work on mandamus reference is made to the *statute 9 Anne,* c. 20, s. 2. It is discussed by Tapping on Mandamus (P. 422 *383), and he notes, as the context of that statute indicates, that the statute of Anne permitted issue upon the answer or traverse of the facts in it, in cases affecting *municipal offices* and franchises. Tapping says that the statute of Anne "has application to municipal offices only." (P. 422 *383.)

The practice of permitting traverse in cases other than those involving municipal offices and franchises has arisen purely out of statutory provisions. Such statutory change was made in England in 1831. Tapping says that the provision of the statute of Anne "has been subsequently extended by *statute, 1 Wm. 4,* c. 21 (A. D. 1831) to writs of mandamus in all other cases." (P. 422 *383.) This statute, enacted in 1831, is not incorporated into the practice of this court, either by any act of Congress or by any rule of this court. The proposed reply presented herewith is mostly a conglomeration of legal conclusions and fails to comply with the rules of pleading.

In cases where, by statute, proceedings subsequent to a return are admitted, the matter assumes the position of a personal action and as to matters of confession and avoidance "pleas must be framed strictly in accordance with the rules of pleading which govern the legal formulae in such actions, in order that the defendant may be enabled to take and raise proper issues." All matters of confession and avoidance must be set up in formal pleas.

Tapping on Mandamus, p. 424 *386.

The petitioners concede that the principal thing sought by the reply is to create issues of fact upon matters occurring in the presence of respondent, a federal judge. Petitioners admit that matters occurring in the presence of the Court are generally held to be concluded by the statement of the judge as to what occurred in his presence, but say that this case does not fall within such rule because—

> "Those are cases, however, where it did not appear that the judge of the inferior court was deliberately acting in violation of a statute. Where, however, there is a question as to an alleged disqualification of the judge, his decision upon such question is not conclusive." (Brief of Petitioners on motion for appointment of a commissioner, p. 6.)

We are not clear what the ground for the distinction is for which petitioners contend, but it is evident that petitioners claim that the matters shown in the answer of the respondent to the rule (reciting proceedings before him and occurring in his presence), are the sub-

ject of hearing before some commissioner where the respondent shall debate with bystanders respecting what occurred before him upon the application for interlocutory injunction. It is respectfully submitted that if a replication may be permitted in some mandamus cases, it is not warranted in an application for a mandamus against a federal judge respecting matters which he sets up in his answer as having occurred before him and in his presence. *The answer of a judge respecting matters occurring in his presence is conclusive.*

The reasons which impel the rule that the *answer of a judge,* respecting matters which happen before him, must be taken as *conclusive* are stated in the case of *State ex rel v. Cooper,* 107 Tenn. 202, 212.

> "A different rule would lead to endless confusion. It would substitute the recollections of counsel and bystanders for that of the trial judge. It would virtually put the judge himself on trial whenever a difference arose between him and litigants or their counsel. Affidavits and counter affidavits might be heard, and a trial within a trial would result."

In the case of *Black v. Youmans,* 245 Fed. Rep. 460 (Circuit Court of Appeals, Eighth Circuit), the matter before the Court was a petition for mandamus to compel respondent to settle and sign a bill of exceptions. The Court, speaking of the answer of the Judge to the mandamus petition, in that case says, that the matter therein referred to—

> "is a statement with reference to facts occurring before him, and within his personal knowledge, and his return is conclusive,"

citing cases.

In the case of *in re: Streep,* 156 U. S. 207, the application was for a mandamus where a judge resettled a bill of exceptions. Affidavits were presented showing that the bill of exceptions as signed by the Judge was incorrect, that it was incorrect according to the stenographer's minutes. The Court declined to enter into consideration of such affidavits, and denied the mandamus. The statement of the matter is by the Chief Justice.

In the case of *Thatcher v. Killits,* 195 Fed. Rep. 471, (Circuit Court of Appeals, Sixth Circuit), mandamus was sought to compel the Court to insert certain statements in the transcript of disbarment proceedings.

> "Relator seeks to traverse this return of the District Judge (to the mandamus), and to have a trial of the issue whether the judge did or did not read the testimony, and perhaps of the issue whether the judge made the statement in question. We regard it as the clearly settled rule that where a judicial officer is engaged in settling a bill of exceptions, or in analogous duties, and where a mandamus is sought against him in connection therewith, his return, as to a fact occurring before him, and within his personal knowledge, is, for the purposes of the mandamus proceeding, conclusive. This is the settled rule of the Supreme Court of the United States and of all the states in this circuit, except so far as modified in Kentucky by statute."

Citing cases.

The Court says (P. 473):

> "It is not to be tolerated that a party may raise and try out separate issues upon a variety of incidents occurring during a previous trial. This would make litigation never-ending. We think the established rule must stand, and must be applied in this case, and that the return of the trial judge must be taken as true."

In the case of *People ex rel v. Judge of Wayne Circuit Court,* 23 Mich. 536, petition for mandamus was to compel the respondent to set aside a judgment, (wherein the Court had entered a judgment upon a trial before the Court without a jury), and to enter an order for a trial by jury. The petitioner asserted the making of a jury demand. A rule to show cause was made upon the respondent.

> "The respondent answered, stating what he alleged to be facts, as to what had transpired in his presence. Some of the statements of fact in the answer, as to what action the Circuit Judge had taken, and what had occurred in the premises within his own knowledge, varied essentially from the statements of the same in the petition."

The memorandum opinion reads:

> "The Court held that the return must be conclusively taken to be true so far as it states facts as to the respondent's own action and what occurred in connection therewith within his own knowledge, and that an issue of fact would not be allowed to be framed upon it. Mandamus denied, with costs."

Before entering further into the reply, we should briefly call attention to the *cases cited by petitioners.*

The *principal cases relied upon by petitioners are:*

United States v. Boutwell, 17 Wall (84 U. S.) 604; 21 L. Ed. 721.

United States v. Schurz, 12 Otto (102 U. S.) 378.

United States v. Fisher, 222 U. S. 204.

No one of such cases was an original mandamus in this court, nor one originating in a circuit or district court of the United States. They are cases commenced in the Supreme Court of the District of Columbia.

This Court clearly pointed out in *United States v. Schurz,* 102 U. S. 378, 393, that the jurisdiction and powers to be exercised by the Supreme Court of the District of Columbia are acquired from the laws of Maryland, of which the District was formerly a part. There is no decision in any of the cases cited by petitioners of the point here in question, and far-fetched inferences are drawn. The cases are not fairly to the effect as contended by petitioners.

The case of *State of Florida v. State of Georgia,* 17 How. 478, cited by petitioners at page 4 of their brief, was a suit in chancery by one state against another to establish a boundary.

The case of *State of California v. Southern Pacific Co.,* 157 U. S. 229, cited by petitioners at page 4, was a suit in equity by the State of California against the Southern Pacific Company to declare the ownership of land.

Petitioners cite the cases of *State of Florida v. State of Georgia,* 17 How. 478 and *State of California v. Southern Pacific Co.,* 157 U. S. 229, to the effect that the Court is not bound by the English common law

practice. This indicates that petitioners consider the *statute of 1 Wm. 4, c. 21, enacted by the English parliament fifty-five years after the formation of this government, to be inapplicable,* and that they ask this Court to extend Rule 5 to embrace such statute into the practice of this court. If such action by this court were sound, as a matter of discretion, in cases involving offices, franchises and similar matters seeking to reduce property or titles of office to possession, this Court should certainly not extend it to a case wherein a peremptory writ is sought against a federal judge to coerce his action. A federal judge should not be put in the position where bystanders and others present in a court, claiming to have knowledge of occurrences there, could state their recollections and thus take issue with him as to what occurred in his own court. Such proceeding would be so foreign to our conception of propriety that we do not believe this Court will create a new rule of practice to produce such result.

If reply to the return of a federal judge in a petition of this type *were allowed,* and if pleadings were loosely permitted so as to allow the matters to be incorporated in the form in which they are presented by the petitioners, *leave* to file the reply *should nevertheless be denied,* for reasons which we will state in the order in which they appear in the proposed reply:

Point I, (a), Reply, p. 3: Petitioners admit that application for injunction was through the medium of respondent's Exhibit 1 (Reply p. 3); admit that the application to assemble a court of three judges, attached

to the petition for mandamus as Appendix C, was expressly withdrawn by the plaintiffs in the court below and was, therefore, no part of the record before respondent upon which action could be invoked (Reply p. 6). The action of the petitioners in securing an alternative writ against respondent upon the presentation of Appendix C as if it were the petition under which action was requested, whereas it is now admitted expressly by the petitioners that such matter was expressly withdrawn in the court below, should move this Court to discharge the rule and dismiss the petition. Had this Court been properly and fairly advised of the situation in the beginning, an alternative writ would not have issued.

Point I. (b), Reply, p. 4: Petitioners admit that application for interlocutory injunction did not call for a three-judge court, was not pursuant to notice to the Governor, as stipulated by section 266 of the judicial code. There is not, and cannot be, any issue of fact therefore as to the assertion in the return to the rule and respondent could not be compelled to assemble a three-judge court and had no power to do so under the application presented.

Point I. (c), Reply, p. 4: Petitioners seek to inject into the record affidavits produced on the hearing below. They were no part of the record in this court when the alternative writ was issued and it is not proper to enlarge or alter the record in this particular sense.

The facts upon which petitioners secured their alternative writ are set forth in a petition, in which peti-

tioners produced what they asserted to be the record of proceedings of the court below. With their proposed reply, so-called, they seek to supplement and alter this record, asserting matters not contained in the original record under which the alternative writ issued. The action of the Court in granting the alternative writ was based upon the record as it existed, and after an alternative writ has issued and answer made to the writ as issued, it is not proper to confuse the issues by thereafter producing affidavits designed to strengthen or supplement the record as it theretofore existed. Production of further affidavits after issuance of alternative writ and answer filed thereto has been held not permissible.

See *McKenzie v. Ruth,* 22 O. St. 371.

The foregoing considerations entirely aside: Whether the facts contained in the affidavits did or did not warrant respondent in issuing the injunctional order which he issued, is foreign to the inquiry here. *The question here is whether the application for an injunction* said to be pending before respondent *requires assembling a three-judge court.* It may well be that the affidavits presented pursuant to the application for injunction were inadequate to warrant any injunction, or proceeded upon grounds which respondent was not authorized to weigh on the application, but this in no way imposed the duty on respondent to assemble a three-judge court. They bear exclusively upon the propriety of issuing an injunction through the medium of a single judge, which is not a question before this court for consideration.

Point II. Reply, p. 5: Petitioners assert that they have power to cancel licenses, and deny that they have disclaimed or renounced such power. They say that this is within their powers under the statute for supposed violation of a rate order. It having been shown to the respondent that there was an intention to exercise such power (Return to rule, p. 13), then whether respondent was sound in his view of the law that there was no such power existing in the Superintendent of Insurance, or whether he was in error on that subject is not a matter before this court for consideration upon the rule to show cause why a three-judge court should not be assembled.

Point III. Reply, p. 6: No issue of fact can properly arise, nor is any issue of fact presented by Point 3 of the Reply.

Point IV. Reply, p. 8: Point IV presents no issue of fact, for it is expressly admitted by petitioners that no notice, as provided by section 266 of the judicial code, was served upon the Governor of the State (Reply, p. 4). No question of fact is presented by the issue under point IV, but the question of law is presented that altho the parties did not proceed under section 266, and did not serve notices upon the Governor and Attorney General, as provided by the section, that the *respondent,* the trial judge, had a duty and that it was "his duty to require that notices under the statute should be given" (Reply, p. 8). It is not the duty of a judge to serve notices or to impose duty of notice upon parties. If they do not give appropriate notice as required by

law, their application for relief will merely be refused until they have made compliance. If they never make compliance, they will secure no relief. There is no issue presented by point IV which could conceivably produce evidence bearing on the issues in this court.

Point V. Reply, p. 8: This point contains nothing but argument of law and admissions and presents no contested issue of fact.

Point VI. Reply, p. 8: The only matter of materiality in this point is the admission that application for interlocutory injunction was made under respondent's Exhibit 1, and "admit that the only motion for an interlocutory injunction before the Court" was such application. There is no controverted issue of fact presented under point VI.

Point VII. Reply, p. 9: This point also presents no issue bearing on the assembling of a three-judge court. As typical of the nature of the reply, we quote from page 10 of the Reply, where it is said: "Petitioners deny that they permitted an order for the taking of depositions in said case, but admit that they consented thereto." There is no statement of fact in the return which is controverted under this point which bears upon the issue before the court.

As typical of the whole reply, we quote point VIII. because it is short, and ask the Court to consider the strictures we make upon it as applicable to all the remainder of the so-called reply also:

> "Petitioners admit that the bill of complaint in said case, and the other cases referred to in the petition, contain allegations of diversity of citizenship in addition to allegations charging unconstitutionality of the statute and of the order; and deny that the fact that an interlocutory injunction was asked and granted does not of necessity involve determination of any constitutional questions under the federal constitution, or necessarily require a statutory three-judge court, or necessarily involve an appeal to the Supreme Court."

We respectfully submit that the so-called reply is nothing but a legal argument, and presents neither an issue of law nor of fact. The brief in support of motion for appointment of a commissioner sets up *what are supposed to be the issues of fact* raised by the reply. It loses sight entirely of the fact that the *rule on respondent is* to show cause *why he should not assemble a three-judge court* to hear a specified application for injunction. An application for injunction was set out in the petition as Exhibit C thereto, which it is now admitted was not before the Court and was expressly withdrawn verbally in the court below. As the main ground of the petition, therefore, is shown to be false, the reasons which impel the granting of the alternative writ fail, and the rule should be discharged.

Petitioners set forth in their brief what *facts they expect to show* before a commissioner.

They say they expect to show by evidence (Brief on motion for appointment of a commissioner, p. 4) that there was a conversation between attorneys in the Kansas rate case out of the presence of the respondent.

No matter what conversations occurred between counsel, it specifically appears that respondent had no knowledge thereof and did not act thereon (Answer to Rule, p. 3). The evidence of what occurred between counsel outside of court in the matter can not be competent in the case and is entirely irrelevant to the inquiry before this Court.

The next bit of evidence which petitioners say they wish to offer (Brief on motion for appointment of a commissioner, p. 5) is that they did not consent to the appointment of a master. As it is admitted that petitioners did call up sufficiency of the bill of complaint before respondent and have it adjudged before him individually, whether or not they also waived by consenting to appointment of a master is merely cumulative evidence of waiver, and whether proven or disproven could not possibly affect the result.

Petitioners say that they would offer evidence that petitioners "stated to the judge that Commissioner of Insurance Hobbs intended to enforce the rate order and to do everything necessary for its enforcement." In the reply to the return, petitioners explicitly assert that one of these enforcement provisions is the right to cancel licenses. (Reply of Petitioners, p. 5.) This *admission* of petitioners, that they intended to enforce the order in any way they could and that one of the things they could do was to cancel licenses, completely confirms the position of respondent, that there *was* in effect *a threat to revoke licenses* by the statements and admissions of the petitioners in open court below.

Even were it true, however, that in the hearing below there was "no evidence introduced to the effect that petitioners threatened to revoke licenses" (Brief of Petitioners on motion for appointment of a commissioner, p. 5), this would bear only on the question of the sufficiency of evidence to sustain the injunction issued by respondent below. *It has no bearing upon his duty to assemble a three-judge court.* Petitioners virtually concede that they may not take evidence upon the occurrences in the court when they stated their intent "to enforce the rate order," (intending thereby to make a threat of revocation of licenses because of institution of suits in the federal court). That the issues of fact should be made upon the language employed, and whether or not it involved a threat to cancel because suit was brought in the federal court or the language employed was not reasonably designed to carry that impression, is certainly an issue upon which this Court should not permit hearing before a commissioner, as is proposed in the brief on the motion for appointment of a commissioner (p. 6), petitioners having explicitly stated the points on which they desire to take evidence. None of these questions bear in any proper way upon the issues here existing; namely, whether the application for an injunction below was such, and the notices served for bringing it before the court were such, as to compel the court below to call two judges to his assistance.

Petitioners admit that no notices were given and no application made purporting to rest upon the grounds which make section 266 applicable, but application pro-

ceeded upon grounds independent thereof. Whether the respondent was justified or not justified in granting an interlocutory injunction, it is unquestionable that no situation was presented requiring the assembly of a three-judge court.

There is nothing presented which would justify the appointment of a commissioner or the taking of evidence, and there is nothing presented in the reply, presenting issues of fact, which can or ought to be heard or considered by the court. We therefore respectfully submit that the application for leave to file a reply should be denied. The answer of the respondent to the rule and the admissions made by petitioners in their briefs herein are such that no good can be accomplished by retaining the petition or further perpetuating the rule to show cause. Therefore the rule should be discharged and the petition dismissed without putting the respondent to further trouble in the matter.

Respondent makes no suggestions to the court as to the action it should take, because of the fact that the petition for mandamus misleadingly stressed an abandoned application for injunction which expressly called for a three-judge court and was pursuant to service of notice upon the Governor and Attorney General under section 266 of the judicial code (See Exhibit C, attached to petition for mandamus).

Petitioners expressly admit now in their reply that the answer is true, wherein it states that said application had been *expressly withdrawn*, was not an application which respondent in any way considered or had

before him, and that the only application for an injunction upon which action of respondent was asked was one which did not purport to act or proceed under section 266.

Respondent feels that his duty to this court is discharged by calling attention to the fact that it was induced to grant the alternative writ against respondent by the prominent presentation of a discarded application for injunction as if it were properly part of the record.

Respectfully submitted,

ROBERT J. FOLONIE,
ROBERT STONE,
JAMES A. McCLURE,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 20, Original.—October Term, 1929.

Charles F. Hobbs, Commissioner of Insurance of the State of Kansas, and William A. Smith, Attorney-General of said State, Petitioners for a Writ of Mandamus to The Honorable John C. Pollock, District Judge of the District Court of the United States for the District of Kansas.

[December 9, 1929.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a petition for a writ of mandamus directing Judge Pollock, of the District Court of the United States for the District of Kansas, to call to his assistance two other Judges under § 266 of the Judicial Code as amended, (U. S. Code, Title 28, § 380,) to determine the prayer for interlocutory and final injunctions against the petitioners in certain suits. An order to show cause was issued and the Judge has made a return. We are of opinion that the writ must be denied upon the incontrovertible portions of the return, and therefore need to consider nothing else.

One hundred and fifty stock fire insurance companies doing business in Kansas have bills in equity, of which the bill considered in this case is a type, pending in the District Court of the United States for the District of Kansas. These bills allege diversity of citizenship and also that the defendant Commissioner of Insurance, one of the present petitioners, has made an order affecting the rates to be charged for the issue of policies of fire insurance that is confiscatory and contrary to the Fourteenth Amendment, but that if not obeyed he will enforce by revoking the plaintiffs' licenses to do business in Kansas. The bills also allege that the statutes of Kansas as construed to authorize the order are unconstitutional like it and for the same reason. The bills pray for a restraining order *ad interim*, an interlocutory injunction after a hearing before three Judges, and a permanent injunction by final decree.

On April 3, 1928, the parties appeared before the present respondent, and on his suggestion the defendants, the present petitioners, agreed to take no action that would be subject to restraint by a temporary restraining order, without first giving notice of intention to do so in ample time for the plaintiff to resort to the Court. An order embodying the agreement and stating that the Court therefore refrained from entering any temporary restraining order was entered at that date, and remained in force for over a year. Shortly after the entry the petitioners presented to the Judge a motion to dismiss the suit, on the ground that the matter was *res judicata* by reason of certain proceedings in the State Court, and also for want of equity, which after argument was overruled. On May 10, 1929, the case was referred to a Master to make findings of fact and conclusions of law concerning the issues in the case. This was upon motion of the plaintiff made on May 4. On May 6 the defendants, the petitioners, notified the plaintiff that they would proceed to enforce the rate order on and after May 20, 1929, and on May 7 filed a motion for a hearing before three Judges, on the plaintiff's application for an interlocutory injunction. This came up on May 10 along with the plaintiff's motion to refer to a Master. The plaintiff "definitely stated that it did not intend to press its prayer contained in its bill of complaint;" meaning thereby its prayer for an interlocutory injunction based upon the asserted unconstitutionality of the Statute and rate orders, and the Judge said that the defendants' motion did not pertain to any matter before the Court, and intimated that he was ready to grant a restraining order. A few days later the plaintiff moved for an interlocutory injunction against the cancellation of the licenses of the plaintiff and its agents. The defendants objected and asked the Judge to call in two others. This the Judge declined to do and issued an order restraining the defendants from cancelling licenses because of supposed violations of the rate order in question. The defendants treat this as satisfying the prayers of the bill and requiring three Judges to be within the jurisdiction of the Court to grant.

The Judge knows at least what he intended and supposed himself to do. He states that it appeared to him that the only question before him was the construction of the rate making statute of Kansas, the plaintiff conceding its constitutionality for the purposes of the motion. He construed the act as not warranting a

revocation of licenses for violation of the rate order or for anything that the plaintiff appeared to have done, and says that the injunction granted by him was not granted upon the ground of the unconstitutionality of the statute but restrained only something that by his construction the statute did not allow. We see no reason why the injunction should be held to go further than the Judge says that he intended it to go, or than its express words, or why those words should not be explained as a construction of the statute rather than an adjudication that it is void. But if the injunction is taken as we say that it should be, it is not within Judicial Code, § 266; three Judges were not necessary, and the petitioners have no right to come here. *Ex parte Buder*, 271 U. S. 461. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317. *Smith* v. *Wilson*, 273 U. S. 388. On the other hand as there was jurisdiction of the cases by reason of diversity of citizenship, as well as on the constitutional ground, an appeal lay to the Circuit Court of Appeals if the petitioner thought the Judge's construction wrong. The Judge was clearly right in treating the plaintiffs in the several cases as masters to decide what they would ask and in denying to the defendants, the petitioners, the power to force upon the plaintiffs a constitutional issue which at that moment they did not care to raise. The fact that the bills raised it did not prevent them from presenting a narrower claim and contenting themselves with the granting of that. Other serious difficulties in the way of the petition are set up in the return, but we think that the foregoing answer makes further argument unnecessary.

Rule to show cause discharged.
Mandamus denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.